

**STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD**

ILO JON ALLEN,
Appellant,

and

STATE OF IOWA (DEPARTMENT OF
TRANSPORTATION),
Appellee.

Case No. 14-MA-11

PUBLIC EMPLOYMENT
RELATIONS BOARD
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DECISION ON REVIEW

This case is before the Public Employment Relations Board (PERB or Board) upon Appellant Ilo Jon Allen's petition, filed pursuant to PERB rule 621—11.8, which seeks the Board's review of a Proposed Decision and Order issued by a PERB administrative law judge (ALJ) on December 24, 2014. In her Proposed Decision and Order, the ALJ concluded that the State of Iowa had established just cause for its termination of Allen's employment with the Department of Transportation on October 1, 2013, and that his appeal from the prior, adverse ruling of the Iowa Department of Administrative Services, filed pursuant to Iowa Code section 8A.415(2), should be dismissed.

Pursuant to PERB rule 621—11.8 and subrule 621—9.2(3), the Board has heard the case upon the record submitted before the ALJ. Counsel for the parties, Timothy Bottaro for Allen and Blair Parker for the State, presented their oral arguments to the Board on March 9, 2015. Prior to oral arguments, the parties filed briefs outlining their respective positions.

On review, the Board possesses all powers which it would have possessed had it elected, pursuant to PERB rule 621—2.1, to preside at the evidentiary hearing in the place of the ALJ. Based upon its review of the record before the ALJ, as well as the parties' briefs and oral arguments, the Board agrees with the ALJ's Proposed Decision and Order and makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The ALJ's findings of fact, as set forth in the Proposed Decision and Order attached as Appendix A, are fully supported by the record. The Board adopts the ALJ's factual findings as our own and they are, by this reference incorporated herein and made a part of this Decision as though fully set forth.

CONCLUSIONS OF LAW

The ALJ's conclusions of law, as set out in Appendix A, are correct, and the Board adopts them as its own. They are, by this reference incorporated herein and made a part of this Decision as though fully set forth, with the following addition and clarification:

1. On review, Allen challenges the ALJ's credibility determinations as to witness testimony regarding Allen smoking on DOT property or in a DOT pickup. It is clear from the decision that she found other witnesses' testimony more credible than Allen's contradictory testimony on the subject. The ALJ stated that the other witnesses' testimony corroborated each other and specifically found that Allen's testimony was in part incredible. The Board does not have sufficient reason to disturb the ALJ's credibility determination, as she

presided at the evidentiary hearing and observed the testimony and demeanor of the witnesses, or the ALJ's conclusions which are supported by that determination.

Having adopted the ALJ's findings and conclusions with above noted addition and clarification, it follows that the Board concurs in the result reached by the ALJ.

ORDER

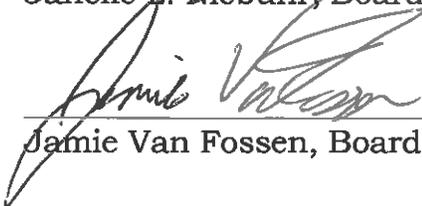
Ilo Jon Allen's state employee disciplinary appeal is hereby DISMISSED.

Dated at Des Moines, Iowa this 24th day of June, 2015.

PUBLIC EMPLOYMENT RELATIONS BOARD

By: 
Michael G. Cormack, Chair


Janelle L. Niebuhr, Board Member


Jamie Van Fossen, Board Member

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APPENDIX A

STATE OF IOWA BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

ILO JON ALLEN,
Appellant,

and

STATE OF IOWA (DEPARTMENT OF
TRANSPORTATION),
Appellee.

CASE NOS. 14-MA-11

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PROPOSED DECISION AND ORDER

Appellant Ilo Jon Allen filed a state employee disciplinary appeal with the Public Employment Relations Board (PERB) alleging that his termination from the Iowa Department of Transportation on October 1, 2013 was without just cause within the meaning of Iowa Code section 8A.415(2).

Pursuant to notice, an evidentiary hearing on the merits was held before me on July 28 and 29, 2014 at the Monona County Courthouse in Onawa, Iowa. The Appellant was represented by attorney Timothy Bottaro and the State was represented by attorney Jasmina Sarajlija. Both parties submitted post-hearing briefs. The State's reply brief was filed on October 24, 2014.

Based upon the entirety of the record, and having given due consideration to the arguments of the parties, I conclude that the State has established just cause for its discharge of Ilo Jon Allen.

FINDINGS OF FACT

Allen began his employment as an Equipment Operator for the Department of Transportation (DOT) in November, 1979. For the past 27

years, he has served as a Highway Maintenance Supervisor in DOT's District 3. Allen's immediate supervisor was Todd Huju, District 3 Maintenance Manager who reported to Todd Lazarowicz, District Engineer. As a Highway Maintenance Supervisor, Allen managed three maintenance garages located in Onawa, Sloan and Soldier as well as supervising the District Maintenance Bridge Crew. In order to carry out his duties, Allen was assigned a DOT pickup truck and received a new truck in April, 2013.

Allen was disciplined on three previous occasions prior to his termination. The first incident occurred approximately ten years ago for failure to report an employee's workplace environment issue, but this record is silent with regards to that incident. The second incident occurred on August 6, 2012. Allen received a five day suspension in violation of DOT work rules when he forwarded to Leana Shull, Garage Operations Assistant, non-work related emails to her DOT email account and gave her permission to forward such emails. The third incident occurred on October 4, 2012 when Allen received a ten day suspension and final warning for smoking on DOT grounds and allowing subordinate employees to do so as well which violated DOT work rules. The final warning letter read in part: "This letter will serve as a final warning and any further violations of these work rules or any similar work rules may result in termination of your employment."¹

Allen challenged both of these actions through the State's disciplinary procedures specified in Iowa Code 8A.415(2). A hearing on both disciplinary

¹ Joint Exhibit 1.

actions took place on January 31, 2013 and an Administrative Law Judge (ALJ) issued two proposed decisions on April 11, 2013. The ALJ concluded that the State, in both cases, established just cause for the discipline. Allen did not contest either of the ALJ's decisions and file an appeal with the Board pursuant to PERB rule 621-11.7.

Allen was a cigarette smoker. Sometime prior to his third disciplinary action (smoking on DOT property), Allen purchased an electronic cigarette (e-cigarette). Although e-cigarettes were allowed in state buildings and right of ways, Allen did not normally smoke the e-cigarette on State property. In fact, he had no recollection of using it outside of the truck as he usually smoked the e-cigarette while driving and it "pretty much stays in the vehicle". Additionally, Allen also filled a prescription for Chantix, a medication used to assist individuals to stop smoking. Allen used this prescription from mid-May through mid-July, 2013.

On August 8, 2013, Garage Operations Assistant Leana Shull, while speaking with Allen regarding unfavorable reports she had received about Kenny Venteicher and Clayton Kluver, both Highway Tech Associates, used the phrase "dumb and dumber" to describe them; "it's like working with 'dumb and dumber'." Additionally, Shull told him that he had to speak with Venteicher and Kluver about their work performance. When the two employees returned to the garage, Allen called them into his office. Allen requested Shull to attend the meeting so that the two employees "couldn't turn things around and say I said things I didn't." During the meeting, Allen told

the employees that co-workers felt they were creating a bad image with their work ethic and waste of time, that it had gotten so bad that some workers called them “dumb and dumber” and that if they did not improve he would begin an investigation. Venteicher was upset. When he tried to speak, Allen told him to listen and be quiet because he did not want any excuses. After the meeting, Shull told Allen that he should not have made the “dumb and dumber” comment as it upset Venteicher.

On August 12th, Venteicher contacted Hujju via phone with regards to the August 8th meeting. In that call, Venteicher complained about the “dumb and dumber” comment. At the end of the conversation, he also said, “you should smell his truck.”

It is the DOT’s policy that when a supervisor or manager becomes aware of a potential violation of DOT work rules then an investigation is conducted. The next higher level of supervision is notified along with DOT’s Office of Employee Services (OES) and an OES employee relations officer is assigned to work with the manager throughout the process. An investigation plan is developed which includes determining whether the employee in question should be placed on paid suspension. Additionally, a determination is made as to who should be interviewed. Once the fact-finding interviews are completed, the materials are reviewed and a determination is made of whether additional information or witnesses are needed. After these interviews are completed, the employee subject to the investigation is interviewed. Once the investigation is completed, a meeting is held to discuss the reason for the

investigation, the investigatory findings, whether work rules or policies have been violated and whether the employee has any previous disciplinary actions. Based upon these facts, a determination is made as to whether discipline should be imposed and what level of discipline is appropriate.

In the instant case, I find that DOT's policy with respect to investigations was followed. On August 13th, Huju contacted Janet Kout-Samson, an employee relations officer in DOT's office of Employee Services regarding his conversation with Venteicher. Based upon her recommendation, Huju contacted Venteicher to clarify as to what exactly happened at the August 8th meeting and what was meant by the phrase "you should smell his truck."

The follow-up interview took place on August 16th at 7:30 a.m. and lasted approximately 20 minutes. This interview and all subsequent fact-finding interviews were taped and transcribed.² When asked to explain what was said during the August 8th meeting, Venteicher stated that Allen said, "Everyone says you guys are lazy and nobody else wants to work with you. Everyone refers to you as dumb and dumber."³ As to the comment, "you should smell his truck," Venteicher told Huju that Allen's truck smelled like smoke and that he had seen Allen smoking in the truck during the past four or five months but that he did not have any documentation.

Approximately one hour later, Allen sent Huju an email which references Huju's call to Venteicher. Attached to the email were the notes he

² A cd of the interviews as well as the transcriptions were admitted into evidence.

³ State's Exhibit 5, page 1.

had made on August 8th with regards to the meeting. Those notes substantiated Venteicher's version on the meeting.

It was also on that day, OES advised Huju to suspend Allen with pay pending completion of an investigation and to conduct additional employee interviews based upon Venteicher's interview. Huju did as OES instructed. He contacted Allen by phone and asked him to meet him at the Sloan garage. Allen agreed to do so but advised him that he was at home. The meeting was documented by Huju in an email to Janet Kout-Samson and read:

I gave the suspension with pay letter this afternoon at 2 PM then collected his keys, cell phone, etc. then drove him home. I did stop back at his pickup at 2:34 PM and there is a smell of smoke, but just in the driver's seat. The back seat nor the passenger seat or other areas do not have a smoky smell that I could detect. I did note that there were cigarette ashes visible in the door handle and on the floor under the driver's seat. In the door handle, the ashes are just flakes, but on the floor one piece was the full circle of a cigarette and about 1/4 to 3/8 inch long. Photos are attached as well as the signed letter of suspension.⁴

Rarely did employees drive Allen's truck. Further, I cannot find that any DOT employee, other than Allen, used his truck that day because to the best of Allen's recollection, he was the only one to drive it on August 16th.

Later that day, the DOT interview team consisting of Huju and either Todd Cogdill, Highway Maintenance Supervisor or Tony Lazarowicz, District Engineer, began conducting fact-finding interviews with employees. Besides Venteicher, the only employees interviewed as to the August 8th meeting were Clayton Kluver and Leana Shull, employees who were in attendance at this meeting. Both employees substantiated that Allen had made the comment

⁴ Joint Exhibit 4, page 1.

that other employees referred to Venteicher and Kluver as “dumb and dumber” and that the meeting had occurred with Shull also in attendance. Shull agreed that Allen had told them that this was their last warning and if they did not straighten out, it would lead to an investigation.

As to the smoking allegation, the team interviewed all employees whose names came up in interviews as having knowledge of the alleged violation. If an employee’s name was brought up in discussion of a specific instance, the named employee was asked specific questions in order to corroborate that the incident occurred as described. Additionally, the DOT conducted follow-up interviews in order to verify that the instances referred to occurred during the correct timeframe; after Allen had received the ten day suspension and final warning. Seven employees were interviewed with two follow-up interviews. All interviews took place between August 16th and September 12th. The answers ranged from a denial that Allen smoked on state property or in his DOT truck to confirming that Allen lit up or smoked on State property. Various witnesses corroborated through their statements that Allen either lit up or smoked on DOT grounds or that the DOT truck smelled like smoke. For example, in the statements of Scott Jordan, Highway Tech Senior with the Bridge Crew, and Dan Wickersham, Senior Equipment Operator, both stated they had seen Allen smoking on DOT grounds near the generator or lighting a cigarette while on DOT grounds before going out to the gate. Additionally, in Jordan’s statement, he recalled that he had seen Allen smoke between the building and the generator and at the time he had said something to Sam Weber, Highway

Tech. Although Weber testified, at hearing, that he did not see Allen smoking, he remembered Jordan calling it to his attention. Similarly, Venteicher's initial statement which alleged that Allen's truck smelled like smoke was corroborated by Greg Mize, a member of the District Bridge Crew, who in his statement described Allen's truck as smelling like smoke when he rode with him from the Onawa to Sloan maintenance garages. Mize's statement was corroborated by Jordan in his first interview statement.

On September 12th, Allen was interviewed with regards to these two allegations. Allen admitted to having a meeting with Shull present as well as advising the two employees in question that other employees called them "dumb and dumber." As to the allegation that he smoked on DOT grounds after receiving the last disciplinary action, the interview went as follows:

TH – Have you smoked on DOT grounds since October 4, 2012?

JA – No, I have not, other than right of way. Other than right of way I guess.

TH – Like out by the gates of the shops?

JA – Along the highway.

TH – I want to remind you that you need to be forthcoming and honest with your responses.

JA – (inaudible)

TH – Have you smoked on DOT grounds since October 4, 2012?

JA – What was the date when?

TH – That was the date that you were disciplined – got the 10-day and final warning.

JA – No, I have not.

TH – Ok. It's been reported to me that there have been times since October that you light up as soon as you step out of the Onawa maintenance garage on your way to the gate. Can you explain that?

JA – Possible if it's real windy I might protected from the wind so that I can get it lit and then take it out to the gate.

TL – I didn't catch the last part of that.

JA – If it would be real windy out where it would be hard to get my cigarette lit out at the road, I might light up where I'm protected from the wind and then walk out there. I would imagine that it'd be very few times. Somebody is trying hard ain't they?

TH – It's been reported to me that there have been times since October 4, 2012, that you light up when you are like halfway across the parking lot at the Onawa maintenance garage. Can you explain that? Between the building and gate.

JA – It either be right by the building out of the wind or it'd be out there.

TH – It's been reported to me that there have been times since October 4, 2012 that you smoke out front by the pickups where they are parked or by the generator at the Onawa maintenance garage. Can you please explain that?

JA – That's not correct.

TH – It has been reported to me that there have been times since October 4, 2012, that you have smoked on the DOT property at the Sloan maintenance garage while walking to the gate and that you have smoked anywhere from by the fuel tanks to out half-way across to the gate.

JA – (inaudible)

TL – Just so I understand so you do say you might have lit up on your way out to the.

JA – No, it if's real windy I have possibly lit my cigarette up by the shop out of the wind and then carried it out to the gate and have my cigarette. Otherwise, no. And I don't think it would

have probably been more than two times for that. I might be fiddling with my cigarette on the way out there. Who the hell is bringing all this shit up – Greg and Scott again?⁵

Although Allen testified that the possibility was based on practices prior to October of 2012, I do not find this explanation credible. Nowhere in the exchange does Allen say or infer that he is basing this “possibility” on events prior to October 2012. There was no indication that Allen was confused; Huju noted that Allen’s facial expressions did not illustrate confusion, he did not ask for clarification, nor in listening to Allen’s statement did he sound confused as to the period of time that Huju and Lazarowicz were asking about within their questions.

Allen denied smoking in his truck by asserting that he used his e-cigarette. When asked to explain why there were cigarette ashes in the door handle and on the floor, he replied “I don’t know – it blew in there or somebody was smoking in there.”⁶ As to why the truck smelled like smoke, he replied that it was “probably from me I suppose – my clothes or somebody else used it and maybe smoked in it – I have no idea. I guess I never noticed that it smelled like smoke.”⁷ At the end of the interview when asked if they should talk to anyone else, Allen replied:

JA – I’m sure you’ve talked with Leana for the Kenny deal and Clayton. And the rest of it just don’t make no sense so I don’t know who you talked to. Just about anybody could tell you what my bridge crew guys are up to, what they’re trying to do and I’ve had it with that. I’m going to eliminate that problem.

⁵ State’s Exhibit 14, pages 4-5. TH = Todd Huju, JA = Jon Allen and TL = Tony Lazarowicz.

⁶ State’s Exhibit 14, page 7.

⁷ State’s Exhibit 14, page 7.

TH – What do you mean?

JA – I'm going put a halt to the harassment and the bull crap going on.

TH – Can you explain that?

JA – (little laugh/chuckle) I ain't explaining more, I'm just going make sure it gets stopped. The way things are right now, I could care less if I come back to this place. But I will fight for my benefits that I've worked my butt off to get.⁸

After Allen's interview, a committee made up of Huju, Lazarowicz, Kout-Samson, the Highway Division Administrator and Lee Wilkinson, DOT's Operations and Finance Director, met and recommended that Allen be terminated. This decision was based upon Allen's statements verifying that the August 8th meeting took place just as Venteicher had described, his statements that it was possible he smoked or lit up on DOT grounds, the pictures taken by Huju of ashes in his DOT truck, as well as subordinate employee statements. The committee believed termination was warranted as Allen had previously received a final warning.

On October 1st, Allen's *Loudermill* hearing was held. At the end of the meeting, Allen was given a termination letter which stated that he was being terminated for violation of DOT work rules. The letter stated in part:

This action is being taken as a result of your violation of the following Iowa Department of Transportation Work Rules.

I. WORK PERFORMANCE

1. Failure or refusal to follow the written or oral instructions of supervisory authority.

⁸ State's Exhibit 14, page 8.

5. Intentionally falsifying records, dishonesty, or giving false information.

IV. PERSONAL ACTIONS AND APPEARANCES

5. Failure to observe smoking regulations

10. Intentionally falsifying records, dishonesty, or giving false information.

These rules were violated when:

- You failed to follow DOT PPM 020.06 *Smoking* when you lit cigarettes and carried on DOT grounds and when you smoked in your DOT pickup;
- You failed to follow PPM 230.08 *Workplace Environment* due to your comments you made to employees in an August 8, 2013 meeting.
- You were dishonest in the investigation; and
- For your conduct during the investigatory interview.⁹

Allen appealed his discharge to the director of DAS pursuant to Iowa code section 8A.415(2) and Chapter 61 of the DAS rules. A third-step meeting was held on November 14, 2013 and a third step response which upheld the discharge was issued by the DAS director's designee on December 12, 2013. Allen timely appealed the 3rd step response to PERB pursuant to Iowa Code section 8A.415(2)(b) and PERB rule 621-11.2.

CONCLUSIONS OF LAW

Allen filed this appeal pursuant to Iowa Code section 8A.415(2)(b) which provides in part:

If not satisfied, the employee may, within thirty calendar days following the director's response, file an appeal with the public

⁹ State's Exhibit 17.

employment relations board. The employee has the right to a hearing closed to the public, unless a public hearing is requested by the employee. The hearing shall otherwise be conducted in accordance with the rules of the public employment relations board and the Iowa administrative procedure Act, chapter 17A. 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....

In discipline cases, the State bears the burden of establishing just cause for the discipline imposed. *Gleiser and State of Iowa (Department of Transportation)*, 09-MA-01 at 18; *Harrison and State of Iowa (Department of Human Services)*, 05-MA-04 at 9.

The term "just cause" as used in section 8A.415(2)(b) and DAS rule 11-60.2 is not defined by statute or rule. *Gleiser*, 09-MA-01, at 16; *Harrison*, 05-MA-04, at 8; *Hoffman and State of Iowa (Department of Transportation)*, 93-MA-21 at 23. In determining whether the State has established just cause, PERB has long held that there is no fixed test to be applied. Instead the Board looks to the totality of circumstances. *Gleiser*, 09-MA-01, at 16; *Harrison*, 05-MA-04, at 8. This includes the employee's conduct as well as 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 progressive discipline was followed, or is not applicable under the circumstances; whether the punishment imposed is proportionate to the offense; whether the employee's record,

including years of service, performance and disciplinary record, has been given due consideration; and whether there are other mitigating circumstances which would justify a lesser penalty. *Gleiser*, 09-MA-01, at 16-17; *Harrison*, 05-MA-04, at 8-9; *Hoffman*, 93-MA-21 at 23.

Allen argues that the State lacked just cause for his termination because there is insufficient proof that he violated DOT policies, that the State did not conduct a sufficient and fair investigation, that the termination was not proportionate to the offense and lacked due consideration of his tenure with the DOT.

Although there were several violations of DOT rules delineated in Allen's termination letter, both the State and Allen focused primarily on two of the violations; failure to follow DOT's work rules regarding smoking and workplace environment policies.

The DOT relied primarily upon Allen's statements made during his investigatory interview. Additionally, the State relied upon the investigation statement of other DOT employees, as well as the pictures taken by Huju of Allen's DOT truck. Based upon this evidence, I conclude that the State had more than sufficient proof to establish that Allen violated DOT work rules with respect to workplace environment and DOT's smoking policy.

The DOT had sufficient proof that Allen violated DOT's workplace policy by his conduct at the August 8, 2013 meeting. As to this meeting, Allen's version of the meeting matched those in attendance; Venteicher, Kluser and Shull. Allen argues that there is no evidence that he violated a DOT policy or

rule which prohibited either the fashion or manner in which this meeting was conducted, nor was there evidence that his comment that other employees called Venteicher and Kluver “dumb and dumber” created a hostile work environment or constituted inappropriate conduct.

The goal of DOT’s work place environment policy (PPM 230.08) is to “create a work environment that is free of inappropriate and/or offensive behavior” and specifically prohibits “comments or behaviors that are derogatory, demeaning, insulting, intimidating or mean spirited.”¹⁰ Allen violated this policy when he called the two employees into his office and in the presence of another employee told them that other employees had complained about their work behavior and some refer to them as “dumb and dumber.” Telling employees that their colleagues refer to them as “dumb and dumber” is an insulting and mean spirited comment. Even Shull, the employee who originally made the comment to Allen recognized that it was not appropriate under the circumstances and told Allen he should not have repeated it. By making this comment to these employees, not meeting with each employee in private, and having an employee sit in the meeting as a witness in order to provide him protection in case his version of the events was questioned, Allen violated the State’s work place environment policy. His conduct and comments failed to maintain a work environment in which these two employees, Venteicher and Kluver, were treated with dignity, respect and in a

¹⁰ State’s Exhibit 22, page 2; I(A) and (C)(1).

professional manner as required by DOT's workplace environment policy, PPM 230.08.

The State had sufficient proof that Allen violated DOT's smoking policy (PPM 020.06) which prohibits smoking (inhaling, exhaling, burning or carrying) a lighted cigarette anywhere on DOT ground or in any vehicle provided by the department.¹¹

Allen argues that the evidence fails to prove that he violated the DOT smoking policy and contends that his comments made in his investigatory statement were general, uninformed comments based upon prior smoking practices in explaining what might have been possible. However, I find Allen's contention without merit. As I have previously found, there was no indication that Allen was confused by Huju's questions. Nor did Allen infer or state during the interview that his explanations were based upon events prior to October, 2012. There was no ambiguity in the time period in question as Huju told Allen that the time frame was after October 4th. After Allen asked about the date, Huju explained that it "was the date that you were disciplined – got the 10-day and the final warning." Thus Allen should have been sufficiently aware of the time period in question. Allen also should have been aware of the allegations as Huju specifically informed him of each allegation. For example, "there have been times since October that you light up as soon as you step out of the Onawa maintenance garage on the way to the gate."¹²

¹¹ State's Exhibit 21.

¹² State's Exhibit 14, page 4.

Allen maintains that Jordan's and Mize's statements lacked credibility as they were "out to get him." It is clear from the record that Jordan and Mize did not like Allen. However, the claim that they were "out to get him" was made solely by Allen and Shull, and there is no evidence that Mize and Jordan tried to get Allen fired. It was Shull who made the statement to the employees at the Onawa garage and to the Sioux City employee that Mize and Jordan wanted to get Allen fired because they didn't like him. Further, it was Allen who in his statement kept blaming Jordan and Mize, his "bridge crew guys," for the allegations and the resulting investigation. Additionally, it was Allen who at the end of his investigatory interview threatened to "eliminate that problem." The initial complaint was the result of a complaint filed by Venteicher. Neither Mize nor Jordan reported to DOT management that Allen was smoking or lighting up on DOT grounds or that his DOT truck smelled like smoke. They were interviewed as part of the investigation and the statements made by these two employees were, as I have previously found, corroborated by others.

As to smoking in the DOT vehicle, Allen contends that he has no idea why there were ashes in his truck and suggests that other employees had access to his vehicle, or that they may have blown in while he was smoking outside the truck. However, this explanation is not given a great deal of weight as there is no evidence that anyone other than Allen had used the truck on August 16, the date Allen was suspended pending the investigation. Further, the pictures taken of Allen's truck after he drove it to the location

where he was placed on suspension shows cigarette ashes on the door handle and on the floor, under the driver's seat.

Based upon Allen's statements, the investigatory statements of other DOT employees, and the pictures taken of the inside of Allen's truck, I conclude that there was sufficient proof that Allen had violated DOT's smoking policy by smoking and lighting up while on DOT grounds as well as smoking in his DOT truck.

Allen argues that the State's investigation was not sufficient and fair with regards to the questioning of Allen and the various employees. PERB has previously held that an investigation is sufficient and fair when the investigation was sufficient to garner the facts necessary for the State to make an informed decision about whether discipline is appropriate and the form of discipline to be imposed. In the instant case, the investigation arose from a complaint made by an employee to a DOT manager. Once the complaint was received, DOT did not deviate from its policy with respect to employee investigations. Employees who had information regarding the allegations, as well as Allen, the affected employee, were interviewed.

As to the August 8th meeting, the investigation centered on whether Allen had violated DOT's work place environment policy. I conclude that the investigation was sufficient and fair as DOT interviewed all employees in attendance at the meeting, including Allen, to collect each person's version of the facts. Further, all of the participants, including Allen, described the meeting consistent with how it was reported in the initial complaint.

As to the smoking violation, I conclude that the investigation was sufficient and fair as the DOT interviewed seven employees, all whose names were mentioned as having information pertinent to the smoking allegation. Questions were asked in order to corroborate the various incidents and follow-up interviews were conducted as warranted.

Allen argues that the DOT learned of Allen's use of an e-cigarette early in the investigation process and as a result should have conducted follow-up interviews to determine if witness observations of Allen smoking were that of an e-cigarette. However, Allen's own testimony rebuts this contention as the evidence shows that Allen primarily smoked the e-cigarette when he was driving. Thus, there was no need to ask employees about e-cigarettes as they were testifying as to what they saw on DOT grounds.

During Allen's interview, he was given the opportunity to explain his actions. As to his interview, Allen contends that because he was not provided copies of the investigatory interviews, his statements were general and uninformed made without the opportunity to know the details of the allegations against him. However, as Allen admitted at hearing, there is no obligation by the State to provide these statements to him during the investigatory process. Nor, as discussed above, can I conclude Allen's statements were general, uninformed comments. Allen was aware of the allegations surrounding the investigation and had received a final warning, thus it is not realistic to believe that Allen would have made general,

uninformed comments as failure to provide the DOT with a plausible explanation for his behavior could result in termination.

Once the interviews were completed, the DOT followed its designated procedure. A committee made up of DOT supervisors, DOT employee relations officers as well as a DAS personnel officer met to determine whether discipline should be imposed and if so, the level of discipline. In making its determination whether discipline should be imposed, the committee relied primarily upon Allen's statements made in the investigatory interview; that it was possible that he may have smoked or lit up near the buildings located on DOT property, as well as his statements with regards to the August 8th meeting. The committee also looked at the pictures of his DOT truck showing cigarette ashes on the door handle as well as a cigarette ash on the floor beneath the driver's seat, employee statements regarding the smoking issue, as well as the employee's descriptions of what had occurred at the August 8th meeting. With regards to the level of discipline, it appears the committee primarily considered the final warning previously given to Allen for violation of the DOT's smoking policy.

By adhering to DOT's process with respect to investigations as established in DOT policy, and gathering information from various sources including photographs and interviews from both employees and Allen, I conclude that the investigation was sufficient and fair so as to garner the facts necessary for the DOT to make an informed decision about whether discipline should be imposed and the appropriate level of discipline.

Having found there was a sufficient and fair investigation that yielded sufficient proof that Allen violated DOT work rules, the next question is whether termination was appropriate for the offense given Allen's longevity as a State employee.

Allen argues that the violations of DOT work rules were not proportionate to the offense. He contends that the DOT's decision to terminate an employee who had worked at the DOT for over 34 years for a smoking violation was extreme and questions whether due consideration was given to his career. Although I agree with Allen that it is difficult to determine what weight the State placed on his length of employment, I cannot find that Allen's length of service is sufficient to overturn the State's decision to discharge him.

I find that in this case, termination was appropriate given Allen's final warning. Under the DOT's progressive discipline policy, Allen had previously received a 5 day suspension and a final warning in conjunction with a 10 day suspension. Although, Allen does not believe that the discipline previously imposed by the State was warranted, this is not relevant to my determination, as an ALJ in both cases determined that the discipline imposed was appropriate under the circumstances. If Allen was not satisfied with the ALJ proposed decisions, Allen should have filed an appeal with the Board. By not doing so, Allen's previous discipline must be taken into consideration and plays a significant role in determining whether the State had just cause to terminate Allen. The final warning put Allen on notice that failure to abide by

the DOT work rules prohibiting smoking on DOT grounds or state provided vehicle or a violation of any similar work rule would, in the next instance, result in termination. Allen failed to correct his behavior as there is sufficient proof that he lit and smoked cigarettes on DOT property and smoked in a DOT truck. Further, there is no evidence of acceptance of responsibility by Allen. Instead of acknowledging that his behavior was the cause for the investigation, Allen blamed employees who he believed were out to get him. In fact, during his investigatory interview he even stated that he was going to “eliminate the problem.” Nor has Allen acknowledged any wrong doing when he repeated the “dumb and dumber” comment in the meeting with the employees. Even Shull, the employee who originally made the comment to Allen, recognized its inappropriateness. Considering all of the circumstances, I cannot conclude that Allen’s termination was excessive under the circumstances. Accordingly, Allen’s violation of the DOT work rules warranted his termination.

Having considered the entirety of the record and all of the arguments raised by the parties, whether or not specifically addressed above, the State had just cause within the meaning of section 8A.415(2) to terminate Allen’s employment with the DOT.

Consequently, the following is proposed:

ORDER

Ilo Jon Allen's state employee disciplinary appeal is hereby DISMISSED.

DATED at Des Moines, Iowa, this 24th day of December, 2014.

PUBLIC EMPLOYMENT RELATIONS BOARD

Susan M. Bolte

Susan M. Bolte
Administrative Law Judge

Original filed.

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