STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

BRUCE FLIPPIN, Appellant, and STATE OF IOWA (DEPARTMENT OF NATURAL RESOURCES), Appellee.	)	CASE NO. 14-MA-13

RECEIVED
2015 OCT 21 AM 11:54
PUBLIC EMPLOYMENT RELATIONS BOARD

DECISION ON REVIEW

This case is before the Public Employment Relations Board (PERB or Board) on Appellee State of Iowa's petition for review of a Proposed Decision and Order issued by an administrative law judge (ALJ) following an evidentiary hearing on Bruce Flippin's Iowa Code section 8A.415 appeal. In his Proposed Decision and Order issued June 9, 2015, the ALJ concluded that that the State of Iowa had not established just cause for its termination of Flippin's employment with the Department of Natural Resources (DNR) on January 10, 2014. The ALJ found, however, that Flippin's conduct warranted the imposition of a three-day suspension and ordered Flippin's reinstatement to his former position with back pay and restoration of benefits.

Counsel for the parties, Jeffrey Edgar for the State and James Gilliam for Flippin, presented their oral arguments to the Board on September 23, 2015. Prior to oral arguments, the parties filed briefs outlining their respective positions.

Pursuant to Iowa Code section 17A.15(3), 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. For its review and pursuant to PERB rule 621-11.8 and subrule 621-9.2(3), the Board has utilized the record as submitted to the ALJ. Based upon its review of this record, as well as the parties' briefs and oral arguments, the Board 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 hereof as though fully set forth.

CONCLUSIONS OF LAW

We have carefully considered the State's arguments in our review of the ALJ's conclusions. Except as noted below, we agree with the ALJ's conclusions as set out in the Appendix and adopt them as our own, with the following discussion and modification to the discipline we believe is warranted in this particular case:

The thrust of the State's argument on review is that Flippin's conduct violated the EO/AA/AD policy. However, we agree with the ALJ's determination that Flippin's conduct did not violate the EO/AA/AD policy, but his conduct did violate DNR work rules prohibiting unbecoming conduct. Even if we assumed that Flippin's conduct violated the EO/AA/AD policy, this does not necessarily

mean that we would find that there was just cause for his termination. There are multiple factors we consider in determining whether there was just cause for the disciplinary action. Sufficient proof of the employee's guilt of the offense is only one factor. In this case, there was sufficient proof that Flippin violated DNR work rules. Thus, as the ALJ determined, the State established misconduct by Flippin that justified disciplinary action. We also agree with the ALJ's analysis and determination that there were a number of factors relevant to a just cause determination that did not justify termination in this case.

In determining the appropriate discipline, we agree that *Allen & State (Dep't of Transp.)*, 13-MA-05, is most akin to the present case of the few prior PERB cases involving misconduct related to sex. However, we find that the five-day suspension in *Allen* is the equally appropriate discipline in the present case rather than a three-day suspension. As the ALJ noted, the *Allen* employee is distinguishable from Flippin. The *Allen* employee was held to a higher standard because of his supervisory status and the employee's misconduct at issue involved numerous inappropriate emails. In contrast, Flippin was not a supervisor at the time he received disciplinary action and his misconduct involved a single incident of crass behavior. At the same time, we agree with the State's assertion on review in this case–that in *Allen*, the employer (the State) placed great weight on the employee's excellent work record spanning thirty-four years of state employment in making its determination that a five-day suspension was appropriate rather than more severe discipline. In comparison, Flippin had six years of service with the State at the time he received his disciplinary action.

Thus, on balance we find that the mitigating factors of the present case in comparison with *Allen* are of equal weight in determining the appropriate discipline. Therefore, we find the five-day suspension in *Allen* is the equally appropriate discipline for Flippin. We conclude that the State has established just cause for a five-day suspension in this case.

The Board has fully considered all of the State's other arguments on review. None have persuaded us to reach other conclusions different than those reached by the ALJ.

Accordingly, we enter the following:

ORDER

The Department of Natural Resources shall reinstate Bruce Flippin to his former position as a Facilities Engineer II in its Engineering Bureau (if the position still exists, and if not, to a substantially equivalent position), with back pay and benefits, less interim earnings; restore his benefit accounts to reflect accumulations he would have received but for his discharge; make appropriate adjustments to his personnel records and take all other actions necessary to restore him to the position he would have been in had he not been discharged but had instead received an unpaid five-day suspension.

The Board retains jurisdiction of this matter in order to address any remedy-related matters which might hereafter arise and to specify the precise terms of the remedy. In order to prevent further delay in the resolution of this matter, in the event the parties fail to reach agreement, the Board will schedule a hearing to receive evidence and arguments on the precise terms of the remedy,

within 45 days of the below date. Agency action will not be final until the appropriate remedy is approved or determined by the Board. The Board retains jurisdiction to enter whatever orders may be necessary or appropriate to address any remedy-related matters which may hereafter arise.

DATED at Des Moines, Iowa, this 21st day of October, 2015.

PUBLIC EMPLOYMENT RELATIONS BOARD

By: Michael G. Cormack, Chair

Michael G. Cormack, Chair

Jamie K. Van Fossen

Jamie K. Van Fossen, Member

File original

Mail copies to:

Jeffrey R. Edgar
Labor Relations Attorney
Department of Administrative Services
Hoover Building, Third Floor
1305 E Walnut ST
Des Moines IA 50319-0150

James H. Gilliam
Long & Gilliam
5907 Grand AVE
Des Moines IA 50312

Appendix A

RECEIVED
2015 JUN -9 PM 1:33
PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

BRUCE FLIPPIN, Appellant, and STATE OF IOWA (DEPARTMENT OF NATURAL RESOURCES), Appellee.	CASE NO. 14-MA-13

PROPOSED DECISION AND ORDER

Appellant Bruce Flippin filed this State employee disciplinary action appeal with the Public Employment Relations Board (PERB) pursuant to Iowa Code section 8A.415(2)(b) and PERB subrule 621—11.2(3), alleging that the termination of his employment with the State's Department of Natural Resources, based upon his alleged violation of DNR work rules and the sexual harassment provisions of the State's equal opportunity, affirmative action and anti-discrimination policy, was without just cause.

Pursuant to notice, a closed evidentiary hearing on the merits of the appeal was held before me on October 30, 2014, at PERB's offices at Des Moines, Iowa. Flippin was represented by attorney Mark T. Hedberg and the State by attorney Teddra J. Porteous. Both parties submitted post-hearing briefs, the last of which was filed December 9, 2014.

Based upon the entirety of the record, and having reviewed and considered the parties' briefs, I conclude that the State has failed to establish just cause for the termination of Flippin's employment, but that just cause for a less severe form of progressive discipline has been shown.

FINDINGS OF FACT

The vast majority of the relevant facts are undisputed.

Flippin began working as a State employee in June 2008 in the Department of Transportation's Council Bluffs construction office. In October, 2009, he attended DOT training on the State's equal opportunity, affirmative action and anti-discrimination (EO/AA/AD) policy, which includes certain prohibitions against "sexual harassment" as defined in the policy. Flippin remained with DOT until February, 2012, when he took position as a Facilities Engineer II in the Engineering Bureau of the Department of Natural Resources (DNR). On February 17, 2012, Flippin acknowledged having received and been directed to read both the State's and DNR's employee handbooks (the latter containing DNR's general work rules), as well as the State's EO/AA/AD, substance abuse, violence-free workplace and information technology securities policies.

Flippin's work at DNR involved design and construction projects in an 18-county area in southeastern Iowa, with his primary office located near Muscatine. But on what was at times a weekly basis, he traveled to DNR's main Engineering Bureau office in the Wallace State Office Building in Des Moines, where he had a small work space and where he came into contact and interacted with other DNR personnel.

Two female DNR employees Flippin became acquainted with were K.A. and C.M. At the time of the events in question K.A. was a Purchasing Agent II

and C.M. an Accounting Tech III, both assigned to DNR's Budget and Finance Bureau.

Soon after Flippin began working for DNR, K.A. began work as a temporary purchasing agent in the Engineering Bureau, where Flippin was also assigned. The two would at times exchange work-related correspondence, and Flippin would frequently interact with K.A. in person when he was in DNR's Des Moines office. Their relationship included at least some humor about bodily functions, once involving K.A.'s gift to Flippin of *Gas-X*, a product to relieve intestinal gas. Their contacts became less frequent in the fall of 2013, when K.A. took the permanent full-time position in the Budget and Finance Bureau which she occupied at the time of the event in question and her office moved to a location in the Wallace Building away from the Engineering Bureau.

Flippin also had work-related contact with C.M. when he visited the Des Moines office, for matters including the preparation and submission of travel expense claims. The two had a friendly coworker relationship which included humor and the recognition of holidays and each others' birthdays, and Flippin would sometimes stop at C.M.'s cubicle when in Des Moines to say hello and visit.

Among Flippin's personal possessions was a device to produce "buttons" or "pins" akin to those distributed by political campaigns. After creating the message or image to appear on the face of the button on paper, the device was used to press the image and a clear cover onto a metal base with a pin. On one occasion in 2013 Flippin brought a bag of buttons he had produced to the Des

Moines office and showed them to some people, including K.A. The buttons, characterized by Flippin as "of-the-year" awards, struck K.A. as somewhat funny, weird and crude, and as an indication that Flippin had time on his hands. K.A. did not view them as sexual in nature and voiced no objection to Flippin or complaint to any other DNR employee.

On Friday, January 3, 2014, Flippin came to DNR's Des Moines office to discuss issues with managers related to an ongoing DNR project. Shortly before 1:45 p.m., following those discussions, he stopped at K.A.'s work station and presented her with a plastic bag containing three buttons he had made, each approximately 2.25" in diameter. One displayed a cartoon of a woman looking at herself in a hand-held mirror which was surrounded by the caption "I AM FUCKING FABULOUS AND YOU KNOW IT." Another featured a cartoon of a beaver sitting upright on its haunches, surrounded by the caption "HOW DO YOU LIKE MY BEAVER." The third simply bore the text "YOUR COCK NEED SUCKED?" followed by "GOOD LUCK WITH THAT" in a smaller typeface. K.A. looked at the buttons, laughed and wrote a brief email at 1:45 p.m. to her supervisor, Budget and Finance Bureau supervisor Trisha Buck. K.A.'s email, with "OMG EWW" as its subject line, stated "Bruce Flippin. Will come by when he leaves."

Flippin left K.A.'s work station and stopped at C.M.'s nearby cubicle. Flippin told her he had a Christmas present for her (C.M. having previously told Flippin she had a plant she wanted to give him) and handed her a package containing four buttons he had made. Flippin told her not to open it until she

was off work, but the buttons were contained in some sort of clear packaging and C.M. could see what they were. Taking the buttons as a gag gift, C.M. laughed and Flippin walked off. These buttons, which C.M. discarded after later showing them to and laughing about them with her husband, were described by C.M. as "off color" in the sense their content was not what an employee would feel comfortable saying at work, and which could arguably be given a sexual connotation by an adult. Shown the buttons Flippin had given to K.A., C.M. indicated that the ones given her were not like those given K.A., that she viewed hers as complimentary, not "X-rated" and maybe not even "R-rated." Only two are described in the record — one featuring a picture of a woman looking in a mirror with text to the effect of "who could resist this?" and the other, which C.M. took as a takeoff on a *Seinfeld* episode where the authenticity of a female character's breasts was the topic, consisted of text to the effect of "yes, they are real."

C.M. was not offended by the buttons Flippin gave her, took them as a joke and thought they were hilarious. She did not perceive Flippin was pursuing her, trying to be rude, or harassing or bothering her. She voiced no objection to Flippin or complaint to any other DNR employee, and only mentioned the matter when later questioned by Buck.

When Flippin left her cubicle after giving her the three buttons, K.A. went directly to Buck's office, showed her the buttons and told her what had occurred. Buck's perception was that K.A. was upset, embarrassed and uncomfortable, and she agreed with K.A.'s view that the buttons were vile,

vulgar and sexually explicit. Buck thought them completely inappropriate for the workplace.

Buck assured K.A. that she had done the right thing by reporting the event right away, and suggested K.A. take a break away from her desk to get herself back together and avoid any further contact with Flippin if he was still in the building. Buck advised K.A. that hers was a severe complaint which needed prompt attention, and that they would probably need to meet again before the end of the day to talk in a more formal manner.

K.A. had reported that C.M. may have also been approached by Flippin, so Buck asked C.M. if she had received anything from him. C.M. advised that she had been given buttons by Flippin but that she had not been offended. Buck did not ask to see the buttons.

Buck advised Dave Cretors, chief of DNR's customer and employee services bureau, of K.A.'s report and showed him the buttons Flippin had given to K.A. She also reported that C.M. had been given buttons. The two agreed they needed to report the events to higher-ups, and proceeded directly to the office of DNR Deputy Director Bruce Trautman who was told what had been reported, looked at the buttons, and said that an investigation should be commenced. The three managers discussed how the investigation would proceed.

Later that afternoon Cretors and Buck began the investigation by interviewing K.A. In the relatively brief interview K.A. characterized her relationship with Flippin as "normal coworkers. . . generally have a friendly,

coworker relationship." Although she indicated that Flippin had never before said anything inappropriate to her, K.A. later recounted how Flippin had previously told her about his "having intercourse with a bartender in a small town in his area." K.A. indicated that she had not requested the buttons Flippin had given her, that Flippin had told her he thought she would get a kick out of them and that she "probably [has] a friend to give one of these to." K.A. reported that she found the buttons vile and that she had been grossed out, embarrassed and very uncomfortable when she received them (characterizing Flippin's giving them to her as a "line crosser"), but that she had said "thank you" to Flippin who said goodbye and walked away when she signaled an end to the interaction.

Early the following Monday, January 6, 2014, Flippin received a message that he was to participate in a discussion at 8:00 a.m. at DNR's Wallace Building offices in Des Moines. Upon arrival Flippin met with Cretors, Trautman and two other DNR employees and was interviewed by Cretors with the others present. During the interview Flippin acknowledged giving the buttons to K.A. and C.M., adding that both had laughed when he had given them and that he had not intended to offend either or for the buttons to be displayed in the workplace. He advised that when he gave the buttons to K.A. he said that maybe she could find a girlfriend to wear one of them and that K.A. responded that one of her girlfriends had an upcoming birthday and could wear one.

Although Flippin said he didn't think K.A. would be offended by the buttons because "that was the kind of relationship I had with her," and that he had given buttons to K.A. and C.M. because he thought they "would find some humor on it," neither Cretors nor any of the others asked follow-up questions delving further into the relationship between Flippin and K.A. or why he thought K.A. and C.M. would find the buttons humorous.

During the afternoon of January 6, Cretors and DNR Executive Officer I Jennifer StJohn met with and interviewed C.M., whose statement concerning what Flippin had done and her reaction to it forms the evidentiary basis for the facts found above regarding their January 3 interaction. When shown the buttons Flippin had given to K.A. and asked how she would have felt had she been given those buttons, C.M. indicated she "would have thought 'what signals am I sending to make someone feel comfortable with giving me something like that?' I would assess my behavior and boundaries. Someone doesn't do that unless they feel they have a green light."[1]

Following the completion of the interviews Cretors drafted a report of the investigation and shared his draft with Buck and StJohn, who had each participated in two of the interviews. The report described how the investigation had been conducted and summarized the statements of those interviewed. The report's "conclusion" section stated that "a fair and thorough

[1] The investigation also included January 7, 2014 interviews with DNR Executive Officer II Michelle Wilson, who had conducted a "delivering quality customer service" training to DNR staff (including Flippin) in December, 2013, as well as Sue O'Loughlin, a Secretary II at DNR's Manchester facility, who had participated with Flippin in a role-playing exercise during that training. Because Flippin's termination was based entirely on his January 3, 2014 interaction with K.A., discussion of the interviews concerning this training is unnecessary.

investigation" had been conducted, that Flippin's distribution of three buttons (those he had given to K.A.) constituted violations of the EO/AA/AD policy as it relates to sexual harassment,[2] as well as DNR work rules. The report's conclusion did not find a policy or rule violation based upon Flippin's delivery of buttons to C.M., stating "in the case of [C.M.], without the physical evidence,

---

[2] The policy provides in relevant part:

B. SEXUAL HARASSMENT

Sexual harassment is a violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000e et seq.) as amended, and Iowa Code chapter 216, as amended. "Sexual harassment" shall mean either "unwelcome sexual advances, requests, requests for sexual favors, and other verbal or physical conduct of a sexual nature," or the failure of an employer to remedy a sexually hostile work environment. Sexual harassment violates state policy "when submission to or rejection of such conduct is made...a term or condition of an individual's employment,...(is) used as a basis for employment decisions affecting such individual, or such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment."

Examples of sexual harassment include, but are not limited to:

1. Repeated unwanted sexual advances.

2. Requesting or offering sexual favors in return for job benefits.

3. Actions that are sexual in nature such as cornering, patting, pinching, touching or brushing against another person's body.

4. Open speculation or inquiries about another person's sex life.

5. Jokes, remarks, or innuendo that are sexual in nature about another person, or about men or women in general.

6. Displaying sexually explicit material in the work place.

7. Conditioning work benefits on submission to sexual advances or on tolerance of a sexually hostile work environment, or giving preferential treatment because of another person's submission to sexual advances or tolerance of a sexually hostile work environment.

Sexual harassment can take place between any two (2) state employees, regardless of gender.

it cannot be determined the true nature/content of the buttons she received, however; [C.M.] did overtly state that they were welcomed by her."

The report concluded with a "recommendation" section which provided:

> It is recommended that Executive Management closely examine its tolerance and acceptance of behaviors and exchanges in the workplace involving a sexual content. In this case, it is also recommended that a review of any similar cases be conducted as past practice to help guide discipline in this case. Any discipline less than termination, would suggest that the department has at least some level of tolerance for this type of unsolicited interaction amongst its staff.

Although Cretors had reviewed Flippin's personnel file for any previous discipline he had received, and had found none, the report did not note this finding.

The report, dated January 8, 2014, was signed by Cretors, Buck and StJohn on January 9. The report was forwarded to Trautman who endorsed it that same day, indicating "I have read the report and I accept the recommendations." Although Trautman reviewed the interviews and the policy and rule allegedly violated, he did not review Flippin's personnel records or know whether Flippin had been previously disciplined for any reason.

The ultimate decision on the discipline of DNR personnel rests with the agency's director. Although there is no evidence that the report's recommendation that "a review of any similar cases be conducted as past practice to help guide discipline in this case" was followed, Trautman recommended to the DNR director that Flippin's employment be terminated, and the director concurred.

Accordingly, on January 10, 2014, Trautman signed and delivered a letter addressed to Flippin informing him that he was being discharged immediately. The letter continued:

> Specifically, the charges are that on January 3, 2014, while at work, you gave buttons containing content of a sexual nature to another employee. These items were unsolicited and unwelcomed by the recipient and inappropriate for the workplace. Our investigation brought forth evidence that supports the Department's allegation.
>
> Your actions are in violation of the Department's work rules regarding Personal Actions which state that *Engaging in disorderly conduct, including, but not limited to, horseplay, hazing, harassment, verbal abuse, or similar unbecoming conduct is prohibited or otherwise limited.* You are also in violation of the State's Equal Opportunity Affirmative Action and Anti-Discrimination Policy as related to Sexual Harassment.

Flippin filed an appeal of his termination with DAS in accordance with section 8A.415(2)(a), which was denied, and he filed this appeal with PERB on April 25, 2014.

While the facts found above are undisputed, the record reveals a sharp conflict in the evidence regarding the tone of the relationship between Flippin and K.A. While not central to this case in view of the conclusions drawn below concerning Flippin's alleged violation of the EO/AA/AD policy, some discussion of the conflicting evidence is warranted under the circumstances.

Flippin testified that he and K.A. told each other stories and jokes, and "talked about everything from A to Z," not merely work-related topics. K.A. was not above humor containing sexual innuendo, he testified, and had included plainly sexual references or innuendo in conversations with him. Flippin

specifically mentioned K.A.'s telling him of an incident where she and her friends had tried to embarrass a taxi driver by discussing oral sex while riding in his cab, and recounted K.A. having asked him directly, in less-than-demure terms, whether he was involved in a sexual relationship at the time. Among other actions Flippin attributed to K.A. was her having left the *Gas-X* for him on his desk in Des Moines, together with a bottle of hand lotion with a note: "Comforts of home."

In short, Flippin portrayed his relationship with K.A. as featuring humor about bodily functions and sexual behavior, as one where offense would not be taken by either and as one which was between just them, due to the nature of some of the subject matter.

K.A., on the other hand, characterized her relationship with Flippin as simply a normal, friendly coworker one which involved small talk of the type she engaged in with others. While acknowledging having given Flippin *Gas-X* in response to what she described as a funny situation involving another coworker, she testified she did not recall also including hand lotion and a note with the gag gift. K.A. indicated that her only out-of-the-ordinary interaction with Flippin had been when he told her of having sex with a bartender (a claim Flippin denied, indicating he had said he was "seeing a bartender" in response to K.A. asking if he was involved sexually at the time). K.A. also testified that she did not recall telling him a story about she and her friends attempting to embarrass a cabbie by talking about sex acts in his presence, but stopped short of an actual denial, indicating instead that she does not typically go out

in cabs and cannot remember having done so with friends since her college days. In short, K.A. portrayed her relationship with Flippin as a routine coworker one, with the exception of when Flippin volunteered that he had had sex with a bartender.

Neither Flippin nor K.A. was effectively impeached on their testimony concerning this topic, and neither has been shown to have made prior inconsistent statements about it, even though both witnesses' testimony at hearing was more detailed in this regard than were the statements they made during DNR's investigation. Neither is inherently or obviously unworthy of belief. A fact-finder absolutely required to determine the facts of this matter could point to evidence in the record which could be viewed as supporting or undermining the credibility of both. Here, however, it is unnecessary to make specific factual findings concerning the details of the relationship. It is enough to note that, because the conflicting evidence is in relative equipoise, the record is insufficient to warrant a finding that the tone of the relationship was simply that of one between normal coworkers.

CONCLUSIONS OF LAW

Flippin filed his appeal pursuant to Iowa Code section 8A.415(2), which provides:

> (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 [DAS] 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. 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.

DAS rule sets 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 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, 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.

The State bears the burden of establishing that just cause supports the discipline imposed. *Harrison & State (Department of Human Services)*, 05-MA-04 at 9. The presence or absence of just cause must rest on the reasons stated in the disciplinary letter. *See Eaves & State (Department of Corrections)*, 03-MA-04 at 14.

In evaluating a disciplinary action under section 8A.415(2)(b), the Board looks to the totality of the circumstances.

> [W]e believe that a [section 8A.415(2)(b)] just cause determination requires an analysis of all the relevant circumstances concerning the conduct which precipitated the disciplinary action, and need not depend upon a mechanical, inflexible application of fixed "elements" which may or may not have any real applicability to the case under consideration.

Hunsaker & State (Department of Employment Services), 90-MA-13 at 40.

When analyzing all of the circumstances of alleged misconduct, the Board has instructed that,

> [w]hile 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 & State (Department of Transportation), 93-MA-21 at 23 (citations omitted).

Here, it is clear that Flippin received adequate notice of the reasons for his discharge, as well as notice of the DNR rule and EO/AA/AD policy which DNR concluded he had violated.

Regardless of the nature of the relationship between Flippin and K.A., one can also readily conclude that his presentation of the buttons to her, two of which are plainly sexual in content, amounted to unbecoming workplace conduct prohibited by the DNR rule quoted in the termination letter.

Such is not the case as to the claimed violation of the EO/AA/AD policy, however. The policy defines "sexual harassment" as "unwelcome sexual advances, requests, requests for sexual favors, and other verbal or physical conduct of a sexual nature." Flippin's January 3, 2014 interaction with K.A. did not involve a sexual advance or request for sexual favors. But assuming, without deciding, that it is properly viewed as "unwelcome" (a matter turning upon the true nature of the past relationship between the two) it surely amounted to "conduct of a sexual nature." Accordingly, Flippin arguably committed an act of sexual harassment within the meaning of the policy.[3]

However this policy, surprisingly perhaps, does not prohibit all acts which fall within its definition of sexual harassment. Instead it provides that "[s]exual harassment violates State policy when submission to or rejection of such conduct is made . . . a term or condition of an individual's employment, . . . (is) used as a basis for employment decisions affecting such individual, or

[3] The policy also provides a number of examples of behavior deemed to constitute sexual harassment, including one (jokes, remarks, or innuendo that are sexual in nature about another person, or about men or women in general) arguably applicable to Flippin's action.

such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.'" Judged by this standard, the State has failed to show that Flippin violated the EO/AA/AD policy.

There is no claim that K.A. was somehow required to submit to Flippin's conduct as a term or condition of her employment, or that submitting to or rejecting his conduct was used as a basis for decisions affecting her employment. Nor can one conclude on this record that Flippin's conduct "had the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment." Nothing in this record suggests that Flippin's purpose was to interfere with K.A.'s work performance or to create a hostile or offensive environment. Flippin's delivery of the buttons "interfered" with K.A.'s work on January 3 only briefly, when she left her desk to report to Buck, took a break to compose herself, and was later interviewed by Cretors. Although Flippin's conduct was of a type which, had it persisted, might have created a hostile or offensive work environment for K.A, there is no evidence that his behavior on January 3 actually had such an effect. A number of courts have noted that hostile work environment claims by their nature involve ongoing and repeated conduct, rather than isolated events. *See, e.g., Farmland Foods v. Dubuque Human Rts. Commission,* 672 N.W.2d 733, 745 (Iowa 2003) (*citing National Railroad Passenger Corp v. Morgan,* 536 U.S. 101, 115 (2002)); *Boyle v. Aluma-*

Line, Inc., 710 N.W.2d 741, 747 (Iowa 2006); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986).

While there is thus sufficient proof that Flippin had notice of DNR's work rules prohibiting unbecoming workplace conduct, that his January 3, 2014 interaction with K.A. was such conduct, and that the reason(s) for his subsequent discharge were adequately conveyed to him, a number of factors relevant to a just cause determination do not weigh in favor of the existence of just cause to terminate.

Although the DNR investigators, in their report to Trautman, concluded that they had conducted a fair and thorough investigation, the investigation left something to be desired. As to his interaction with K.A. on January 3, the investigators appear to have been primarily interested in confirming that Flippin gave K.A. the buttons, that she had not requested them, and that she had been offended, thus apparently establishing in their minds that Flippin's conduct was "unwelcome" as the term is used in the policy and in sexual harassment jurisprudence under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e *et seq.*

The "unwelcomeness" of the alleged sexual harassment is the gravamen of any Title IV sexual harassment claim. *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 56, 68 (1986). Sexually harassing conduct "must be unwelcome in the sense that the employee did not solicit or incite it," *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982). Consequently, the alleged victim's conduct is relevant to a determination of whether the alleged

harassment is properly viewed as unwelcome. *Lynch v. City of Des Moines,* 454 N.W.2d at 827, 834 (Iowa 1990).

At least twice during his investigatory interview Flippin indicated that he thought K.A. and C.M. would find humor in the buttons he gave them, and added that he didn't think K.A. would be offended by what he acknowledged was potentially offensive material because "that was the kind of relationship I had with her." This surely suggested the existence of a conflict with K.A.'s earlier characterization of the relationship as simply that of normal friendly coworkers. But the investigators delved no further into why Flippin thought K.A. would find humor in the buttons or into what in their relationship made him think that the buttons would not offend.

Had they done so, the existence of a deeper unwelcomeness issue would have been apparent. When confronted with such an issue one would expect that investigators would have at least reinterviewed K.A. and questioned her about the specifics of Flippin's version of why he thought he, in the words of C.M., "had a green light" to engage in such behavior. Not that such an inquiry would have necessarily altered the investigators' conclusion that Flippin's conduct was unwelcome. The point is that their failure to follow up on his statements suggests the investigators did not appreciate the full breadth of the unwelcomeness issue and thus did not give it the attention it warranted under

the circumstances.[4]

While the State's witnesses characterize the investigators' report as recommending Flippin's termination, such a recommendation is at best only implied, the report merely opining that any discipline less than termination would suggest that DNR has some level of tolerance for such behavior. The direct recommendation of the investigators was, instead, that DNR's executive management "closely examine its tolerance and acceptance of behaviors and exchanges in the workplace involving sexual content" and that "a review of any similar cases be conducted as past practice to help guide discipline in this case." There is, however, no evidence in this record indicating that the recommendation was followed.

It also seems clear that the decision to terminate Flippin's employment was made without due consideration of his lack of prior employment discipline. While Cretors looked for any prior discipline in Flippin's employment record and found none, the report of investigation he authored made no note of this, and Trautman, who concurred in the reports' supposed recommendation of termination and recommended termination to the DNR director, was completely unaware of whether Flippin had been previously disciplined or not.

---

[4] The investigators' report also inaccurately recounts that both K.A. and Flippin described their relationship as nothing more than coworkers. While this may be a fair characterization of K.A.'s statement during her interview, Flippin made no such statement during his, instead suggesting that his relationship with K.A. was one in which she would not take offense to vulgar or sexual topics — hardly a feature of a normal coworker relationship.

Another factor in a just cause determination is whether progressive discipline was followed or is inapplicable under the circumstances. As noted in a recent State employee discipline appeal:

> Progressive discipline is a system of addressing employee behavior over time, through escalating penalties. The purpose of progressive discipline is to correct the unacceptable behavior of an employee. Employers impose some penalty less than discharge to convey the seriousness of the behavior and to afford employees an opportunity to improve.

> Norman Brand, *Discipline and Discharge in Arbitration* at 57 (BNA Books 1998); *See also Phillips & State of Iowa (Department of Corrections),* 98-MA-09 at 14 (stating that the State's disciplinary policy is one of progressive discipline "whereby measures of increasing severity are applied to repeat offenses until the behavior is corrected or it becomes clear that it cannot be corrected.").

Phillips & State (Department of Natural Resources), 12-MA-05 at 16.

The concept of progressive discipline is embodied in the disciplinary action rules of the Department of Administrative Services. PERB has long recognized that its purpose is to correct an employee's behavior, rather than to punish. *See, e.g., Wullner & State (Department of Corrections),* 87-MA-16 at 4; *Bell & State (Department of Corrections),* 88-MA-11 at 7. Some offenses may be serious enough to justify skipping some of the progressive disciplinary steps ordinarily imposed, or to render progressive discipline entirely inapplicable. *Hoffman & State (Department of Transportation),* 93-MA-21 at 26.

The misconduct which the State has established in this case does not rise to the level necessary to conclude that progressive disciplinary principles

are inapplicable under the circumstances. Nor has the State established that Flippin's employment history or attitude is such that the application of progressive discipline would not accomplish the purported goal of correcting inappropriate behavior. Flippin has not been shown to have previously engaged in such conduct, and he acknowledged his poor judgment. DNR's decision to terminate his employment, based upon this single incident of crass behavior, was not proportionate to the offense which the State has established, and is not supported by just cause within the meaning of Iowa Code section 8A.415(2)(b).

The State has, however, established misconduct by Flippin which justifies disciplinary action. Even if one were to reject K.A.'s characterization of her relationship with Flippin and credit his, his violation of the DNR work rule demonstrated, at a minimum, poor judgment and a lack of appreciation of what is and is not appropriate in the work place, under any circumstances.

PERB has decided only a few state employee disciplinary action appeals which involved workplace misconduct related to sex. Two which resulted in the employee's termination involved facts which are readily distinguishable from those in this case. *See Woods & State (Department of Inspections and Appeals),* 03-MA-01 (supervisor originated and exchanged emails through State computers with subordinates and outsiders which included sexual jokes and cartoons as well as graphic photos of nude and scantily clad women displaying their genitals, then attempted to conceal his actions) and *Williams & State (Department of Corrections),* 10-MA-10 (supervisor violated multiple policies and

persistently sexually harassed a subordinate, then issued her retaliatory discipline after she rejected his advances).

Allen & State (Department of Transportation), 13-MA-05, is more akin to the present case, although distinguishable on a number of points, including the fact that the disciplined employee was a supervisor. In *Allen* the ALJ approved the five-day suspension of a supervisor who used a State computer for personal business, including sending and forwarding inappropriate emails to the work computers of subordinates, including 12 suggestive cropped images which appeared to portray body parts and nudity.

Flippin's misconduct, although surely warranting the imposition of progressive discipline, is less egregious than the behaviors which resulted in this five-day suspension, if only because he was not a supervisor whose misconduct involved subordinates and his was a single, isolated incident rather than a continuing pattern of behavior. I conclude that the State has established just cause for nothing more than a three-day suspension in this case.

I consequently propose the following:

ORDER

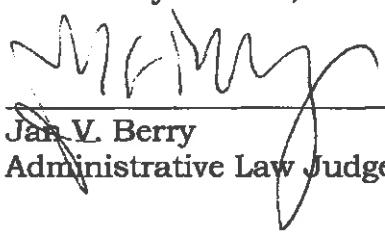
The Department of Natural Resources shall reinstate Bruce Flippin to his former position as a Facilities Engineer II in its Engineering Bureau (if the position still exists, and if not, to a substantially equivalent position), with back pay and benefits, less interim earnings; restore his benefit accounts to reflect accumulations he would have received but for his discharge; make appropriate

adjustments to his personnel records and take all other actions necessary to restore him to the position he would have been in had he not been discharged but had instead received an unpaid three-day suspension.

This proposed decision and order will become PERB's final agency action of the merits of Flippin's appeal pursuant to PERB rule 621--9.1 unless, within 20 days of the date below, a party files an appeal to the Public Employment Relations Board or the Board determines to review the proposed decision on its own motion.

The ALJ retains jurisdiction of this matter in order to address any remedy-related matters which might hereafter arise and to specify the precise terms of the remedy. In order to prevent further delay in the resolution of this matter, a hearing to receive evidence and arguments on the precise terms of the remedy, should the parties fail to reach agreement, will be scheduled and held within 45 days of the date this proposed decision becomes PERB's final action on the merits of Flippin's appeal.

DATED at Des Moines, Iowa, this 9th day of June, 2015



Jan V. Berry
Administrative Law Judge

File original.

Mail copies to: Mark T. Hedberg
100 Court AVE, Suite 425
Des Moines IA 50309

Janet Phipps
Department of Administrative Services
Hoover Building, Third Floor
1305 E. Walnut ST
Des Moines IA 50319-0150