

CASE NO. 100758

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## FINDINGS OF FACT

Appellant Barnard was hired and has been employed since October, 2008, as a Treatment Program Manager (TPM) at the Woodward Resource Center (WRC), an intermediate-care residential facility managed by DHS for individuals with a primary diagnosis of intellectual disability. As of the date of hearing, 142 individuals were WRC residents, 80 percent of whom also have some other mental health diagnosis.

WRC occupies a campus of over 100 acres, which includes office buildings, buildings for the provision of vocational services to residents, and a number of homes in which its clients reside. As of the date of hearing, 12 homes were in use, each occupied by 9-14 residents.

Each home is staffed by a TPM who is responsible for the home's operation and the overall supervision of its staff. The TPM directly supervises the home's Resident Treatment Supervisor (RTS) and its Psychology Assistant. The home's RTS directly supervises a number of Resident Treatment Workers (RTWs), who are the hands-on, front-line employees directly providing needed services to the home's residents. TPMs are supervised by a Treatment Program Administrator (TPA), who reports to WRC's Superintendent.

WRC also employs a nursing staff which includes, in ascending order of responsibility and authority, Registered Nurses, Nurse Supervisors and a Director of Nursing. Unlike TPMs, RTSs and RTWs, not all members of the

nursing staff are assigned to a particular house, but perform a variety of functions in various houses as necessary.

Barnard is the TPM who manages the house referred to as 103 Cherry, the residents of which are exclusively male. In January, 2015, she signed acknowledgements of her receipt of then-current versions of the DHS attendance policy, leave procedure and employee handbook. Section D-1 of the handbook, quoted in part below, sets out “General Standards of Conduct and Work Rules” applicable to DHS employees.

Throughout her tenure at WRC, Barnard has been regarded by management as a good, if not outstanding employee. Prior to the suspension which precipitated the instant appeal, she has not been the recipient of any workplace discipline. The annual performance evaluations for the three years immediately preceding her suspension all rate her overall performance as exceeding expectations.<sup>1</sup>

For some time prior to the events of March 16, 2016, Barnard has had and has expressed concerns about maintaining the safety of the nurses who perform tasks at 103 Cherry and avoiding the triggering of undesirable behaviors by the house’s residents, some of whom are regarded as “high behavior” clients. Barnard’s concerns centered on what she viewed as nurses not communicating their presence or intended activities to the house’s staff. All of the nursing staff, like house staff, have received “MANDT” training on

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<sup>1</sup> Evaluations prior to 2012 were not offered into evidence, but each of the three evaluations which were admitted rated Barnard’s performance on four separate functions/goals. For those 12 specific ratings, Barnard was evaluated as exceeding expectations on seven and as meeting expectations on the other five. In no instance was her performance of any function rated as not meeting expectations.

how to prevent, de-escalate and, if necessary, intervene in the behavior of persons who pose a threat of harm to themselves or others. But unlike the staff of an individual house, the nursing staff is generally not intimately familiar with each resident's behavior support plan (BSP), which notes the individual resident's tendencies, behavioral triggers, likely reactions to various triggers and suggested methods for de-escalating undesirable behaviors by that resident.

Notwithstanding their training, however, incidents have occurred at WRC where nurses have somehow triggered an assault and been hurt by a resident, requiring house staff to come to the nurse's aid and attempt to de-escalate the situation. Barnard, as well as TPMs at other houses, have expressed the concern that nurses who come to the various houses to perform some task need to communicate with the house's staff and coordinate their activities so house staff, who are known to the residents and are familiar with their BSPs and histories, can accompany the nurses or at least know of their presence so they can be prepared to help should the need arise. Although Barnard has communicated these concerns to her supervisor or the Director of Nursing, and had done so again just days before the March 16, 2016 events which resulted in her suspension, she felt that little or no improvement had occurred and that some nurses were still not adequately communicating their presence or intentions to house staff, thus enhancing the potential for resident behaviors which could be minimized or avoided were house staff more fully informed.

The events which led to the imposition of Barnard's discipline occurred during the evening of March 16, 2016, at the 103 Cherry house which Barnard manages. Those events spawned what the State refers to as a "supervisory investigation" which involved interviews (and in some cases follow-up interviews) of 10 individuals which are summarized in a report (State's Exhibit 5) admitted into evidence at hearing. In addition, seven witnesses testified at hearing, all but one of whom had provided statements in the course of management's investigation.

The evidence concerning the events upon which Barnard's discipline was based, and the characterizations of the actions of those involved, are divergent in a number of respects, although a number of basic facts are undisputed. In making the following findings I have attempted to reconcile perceived conflicts in the evidence, which consists primarily of the statements of employees collected during management's investigation and testimony elicited at hearing. Where the evidence is not reasonably reconcilable, I have credited that which is most reasonable and consistent with other credible evidence, giving consideration to established criteria for the making of credibility determinations such as the witnesses' actual knowledge of the facts, memory, interest in the outcome of the case and candor.

Somewhere around 7:15 p.m. on March 16, a resident of 103 Cherry, (hereinafter "J" or "the Client"), engaged in what the parties refer to as a "behavior" in the living room on the "right side" of the house. Although the record is short on detail, one witness referred to J's behavior as an attempted

attack on RTW Frank Jacobs, and another as J becoming upset because his mother had not called him. The sounds associated with the behavior (described by witnesses as “a commotion” and as J screaming) drew the attention of others.

Michael Owens, a RTW working on the “left side” of the house, ran to where J and Jacobs were located, to assist Jacobs. J was known by both RTWs to have a history of becoming physically aggressive and attempting to cause harm to others during such episodes. Barnard also heard the behavior occurring and went to the vicinity, saw that Jacobs and Owens were there dealing with the behavior and talking with J and, knowing his potential for violence and tendency to escalate if more people were present, stayed back in an attempt to remain out of J’s sight.

RN Vickey Gibbons, who was in the house to conduct a quarterly assessment and exam of another resident, also became aware of the behavior and approached from behind where Barnard stood. Barnard advised her that a behavior was going on and that it would be best for Gibbons to stay where she was because J was not safe to be around at that time. While observing from a distance, Gibbons saw a rapid movement by Jacobs and that he and Owens were bending over, but could not tell if they were restraining J and thought that if they were, they needed to get him up off the floor.

Gibbons crossed the room to the immediate area where J and the RTWs were located, in direct proximity to them. The RTWs perceived that Joseph was still in crisis mode and that his behavior was escalating—becoming

angrier and spitting. Jacobs told Gibbons that J was not safe at the moment and asked Gibbons to move away before she got hurt. Gibbons did not move back and Barnard, having heard an RTW ask her to do so, stepped closer and told Gibbons in a firm voice to get out of the way.

Jacobs was upset by Gibbons' immediate proximity to J and her failure to step away when repeatedly asked, believing she was in potential danger and that her presence was interfering with the RTWs attempts to calm the Client while also protecting themselves. Although the record is not clear as to whether the question was directed to Jacobs or Barnard, Gibbons asking whether Jacobs had hit the Client did nothing to defuse the stressful and tense situation. Barnard and Jacobs were both shocked by Gibbons' inquiry and at least Barnard responded—incredulously asking “what?” (according to Barnard), or by saying “Vickie, don’t go there” (according to Gibbons). In either event, Gibbons perceived that Barnard was mad at her.

Gibbons did begin to leave, intending to call her supervisor. But in the course of leaving she made a comment which included the declaration that 103 Cherry was “the worst house on campus.”

Although J was soon calmed and went to his room, both Jacobs and Barnard were upset by what had occurred. Jacobs was angry because Gibbons had not responded to the requests that she move away, thus increasing the danger to herself and the RTWs, and because she had suggested by her question that Jacobs had struck the Client. Barnard was upset because of Gibbons' failure to step away, her perception that Gibbons'



question about striking the client suggested that Barnard would stand by and allow client abuse to occur, and Gibbons' statement about 103 Cherry being the worst house on campus.

Jacobs vented his anger following Gibbons' and J's departures—loudly yelling and swearing, primarily in response to Gibbons' failure to step away during J's behavior and her apparent disregard for safety, but also because he felt disrespected by Gibbons' question about whether he had hit the Client. Barnard and Owens both tried to calm Jacobs, Barnard acknowledging to him that Gibbons' question about hitting the Client had been inappropriate, but instructing that he needed to calm down. Barnard and Owens both felt Jacobs was de-escalating and becoming calmer.

There is no evidence indicating that Barnard "yelled" or "shouted" at Gibbons during the course of J's behavior or immediately thereafter. She was nonetheless upset by what she perceived as yet another example of her standing concern about nurses' failure to recognize the dangers posed by clients. The arrival at the house of pm/night shift Nurse Supervisor Cheryl Randall, whom Gibbons had asked to come to 103 Cherry, only reversed the calming trend which had begun.

When Barnard saw Randall in the house with Gibbons, she reacted angrily and in frustration, assuming Randall had come in response to her earlier interaction with Gibbons. Barnard, who was across the room from Randall and Gibbons, felt it was becoming nursing vs. 103 Cherry. She reacted to Randall's presence by immediately announcing loudly that she



could call her supervisor too. Barnard approached the nurses from across the room, exclaiming loudly that Gibbons can't be involved when there are client behaviors—repeatedly indicating that “Vickie can't do that.” Barnard never approached Randall and Gibbons to the point where either felt their personal space had been invaded, but Randall recognized that Barnard was angry due to her facial expression and the tone and volume of her voice, describing it as “loud” and as “shouting”—uncharacteristic of Barnard based upon Randall's prior interactions with her. Barnard's volume was great enough that it drew the attention of Matt Bramer, a RTW who was serving in a relief role at 103 Cherry that night, and he approached Barnard, Randall and Gibbons from his location in another room.

Precisely what Bramer said while approaching the group is far from consistent, but he angrily and loudly conveyed his view that their interaction should be taking place somewhere other than an area where residents might be present or hear. Barnard and Gibbons characterized Bramer as yelling at Barnard.

Barnard pointedly told Bramer he couldn't tell her what to do, that he should leave her alone. In his interview Bramer did not claim that Barnard was yelling at him or even speaking louder than normal, although Randall characterized Barnard as shouting.

Following these brief yet charged interactions, Randall and Gibbons left the area, as did Jacobs and Barnard. The record contains conflicting evidence concerning whether other 103 Cherry residents were in the room

where Barnard confronted Randall or were sufficiently near that they would have heard, but it is uncontroverted that Barnard's and Bramer's raised voices did not trigger any behaviors or even comments from residents.

Unbeknownst to Barnard, Jacobs paged Gibbons following her departure from the house, while she was talking with Randall. Randall told Gibbons to go on to another house where she had duties and that she would answer Jacobs' page. Randall called Jacobs and spoke with him briefly, then responded again when Jacobs paged Gibbons a second time. Jacobs indicated that he had to get things straight with Gibbons, that she had been saying things and can't talk to him like that. Jacobs was speaking loudly and sounded angry during their first conversation, but was much calmer during their second interaction, which took place only a few minutes after the first.

Following consultation with a number of WRC managers, Randall returned to 103 Cherry with RTS Heather Wilson to do a body check on J and to have Jacobs leave the house for the rest of his shift. Wilson asked Jacobs to come to the house's main office, where they joined Randall. Jacobs vented about how "messed up" the situation had been, employing profanity as he did so, and was told there would be an investigation but that he needed to either "relieve out" to another house or go home for the night.

When Jacobs asked for some time to consider what he wanted to do, Randall conducted a body check on J and found no injuries. Jacobs ultimately decided to go home and left the house.

Barnard's immediate supervisor was TPA Dawn Stevenson. Earlier in the day the two had spoken about Barnard's ongoing concerns about nursing staff and Stevenson had asked Barnard to provide specific examples before setting up a meeting with the Director of Nursing. Barnard had described a number of situations illustrative of her concerns.

But that evening, in the wake of J's behavior, Stevenson was advised by WRC management that an event had occurred at 103 Cherry, that supervisory and "abuse/neglect" investigations would be conducted, and that she should tell Barnard to go home for the night. Stevenson called Barnard, indicating that she'd heard it had been a rough night and that Barnard had been upset, that Barnard wasn't being suspended but should go home and that they couldn't discuss the situation because of the pending investigations. Barnard indicated she understood, but said she wanted Stevenson to know that she had yelled at the nurse.

In order to leave the house Barnard needed to log off her computer, put away confidential material in her office, lock it and gather personal things from the main office. When Barnard went to the main office to retrieve her things she found Randall, Wilson and Jacobs inside. When Jacobs left the room to consider whether he would relieve out or go home Barnard, who had regained her normal composure, told Randall she was sorry for yelling at her earlier, then left for the night.

Two investigations concerning the events of March 16 ensued—the supervisory investigation, which was plainly focused on the actions of Jacobs

and Barnard, and the abuse/neglect investigation into the possibility that Jacobs had hit the Client.<sup>2</sup>

The supervisory investigation was conducted between March 17 and April 15 by WRC Quality Assurance and Investigations Coordinator Shelly Anderson, assisted by at least one other person, Brian Strait, whose precise position at WRC or DHS is not clear from the record. On April 18, 2016, Anderson submitted a report detailing the employee interviews that had been conducted. Her report concluded that Gibbons asking whether Jacobs had hit the Client was not appropriate at the time, but that Jacobs and Barnard had responded to the situations in an unprofessional manner—Barnard by yelling and Jacobs by yelling and swearing—and quoted five DHS work rules she believed Barnard and Jacobs had breached.

WRC Superintendent Marsha Edgington reviewed Anderson's report, Barnard's evaluations and DHS work rules and policies and made the determination that Barnard should receive a five-day suspension as a result of her actions on March 16.<sup>3</sup>

Accordingly, on April 22, 2016, Edgington and Assistant WRC Superintendent Diane Stout signed a letter, received by Barnard that day, advising her that she was being suspended with pay for the equivalent of five

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<sup>2</sup> The record reveals little about the abuse/neglect investigation, other than its ultimate conclusion that possible abuse or neglect of the Client by Jacobs was unfounded.

<sup>3</sup> Edgington's hearing testimony that she reviewed the investigation report prior to deciding what discipline to impose is uncontroverted. In describing the events which led to Barnard's suspension, however, Edgington described the report as indicating that witnesses had reported that Barnard had behaved in a threatening manner and had come into close physical proximity with Randall and Gibbons during their interaction. A close review of the report, however, reveals that no witness interviewed made such assertions.

workdays, and noting that while the action did not reduce her pay, seniority or benefits, it did carry the same weight and seriousness as if the suspension was without pay. The letter continued, in relevant part:

. . . This action is being taken for your violation of the following work rules identified in the DHS Employee Handbook:

**Section D-1 General Standards of Conduct and Work Rules**

2. *Poor work is not acceptable. Employees are expected to perform their work properly and efficiently and to meet performance standards. Employees are expected to seek, accept and accurately complete assignments within deadlines and not neglect job duties and responsibilities.*
4. *Employees shall avoid boisterous or inappropriate discussions and behavior.*
5. *Employees are expected to maintain appropriate control of themselves, even under provocation. The use of abusive, profane, argumentative, offensive or threatening language or attempts to inflict bodily harm or mental anguish will not be tolerated.*
19. *Employees shall cooperate and provide assistance with any type of investigation regarding alleged civil, criminal or administrative misconduct, including cooperating in interviews, producing requested documents or other requests as appropriate.*
21. *Employees shall treat other employees, guests, visitors and Department clients with dignity and respect.*

Our investigation found that on March 16, 2016 you failed to appropriately take control of a situation that occurred at 103 Cherry with an employee. In addition, your interactions with another employee were inappropriate and unprofessional.

You signed an Acknowledgement of Receipt for the DHS Employee Handbook on January 21, 2015.

It is imperative that you understand that your failure to follow the department's work rules and policies is a serious matter.

Further violations of the department's work rules and policies will result in more severe disciplinary action being taken, up to and including discharge.

Jacobs was suspended for three days without pay due to his actions. Unlike Barnard, Jacobs was an employee covered by a collective bargaining agreement, but no grievance pursuant to the collective agreement's procedures was commenced. Neither Gibbons nor Bramer, or any other WRC employee, was disciplined for their actions on March 16.

Barnard appealed her suspension to the director of the Department of Administrative Services (DAS). On June 23, 2016, the DAS director's designee issued an answer which denied Barnard's appeal, concluding that just cause for the suspension existed due to Barnard's violation of all of the work rules cited in the disciplinary letter except rule D-1(19).

Barnard's timely appeal to PERB was filed on July 22, 2016.

#### CONCLUSIONS OF LAW

Barnard's DAS and PERB appeals were filed pursuant to Iowa Code section 8A.415(2), which provides:

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

The State bears the burden of establishing that just cause supports the discipline imposed. *Harrison & State (Department of Human Services)*, 05-MA- 04 at 9.

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:

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. (Footnote omitted.)

*Hoffmann & State (Department of Transportation)*, 93-MA-21 at 22. PERB has also given consideration to how other similarly situated employees have been treated. *See, e.g., Lang & State (Department of Corrections)*, 87-MA-09 at 9.

A preliminary issue in this case concerns the stated reasons for Barnard's discipline. As required by Iowa Code section 8A.413(18), DAS rules provide that employees disciplinarily suspended, demoted, reduced in pay or discharged be provided with a written statement of the reasons for the action. PERB has long held that the presence or absence of just cause must be determined upon the stated reasons alone. *See, e.g., Hunsaker & State (Department of Employment Services)*, 90-MA-13 at p. 46, n. 27.

The reasons for Barnard's discipline contained in the suspension notice she received are that she violated five DHS work rules when, on March 16, 2016, she (1) failed to appropriately take control of a situation which occurred at 103 Cherry with an employee and (2) when her interactions with another employee were inappropriate and unprofessional.

Although the notice does not identify the employee involved in the "situation" Barnard allegedly failed to control, or the other employee with whom she allegedly interacted inappropriately and unprofessionally, it appears from the notice that both reasons refer to Barnard's actions in relation to only two employees (*i.e.*, "an employee" and "another employee"—both singular) rather than to a greater number.

While the disciplinary notice is thus no model of clarity, Superintendent Edgington provided greater insight as to her "failed to appropriately take control" reason, explaining at hearing that Barnard had failed to intervene and calm Jacobs. This reason can only logically refer to Jacobs' profanity-laced reaction to Gibbons' involvement in the Client's behavior and her suggestion that he may have struck the Client. And the State, in both its third-step response and its post-hearing brief, clearly views Randall as the employee involved in Barnard's allegedly "inappropriate and unprofessional" interaction.

The existence of just cause for Barnard's suspension must be determined upon these grounds alone ( *i.e.*, Barnard's alleged failure to take control of Jacobs' adverse reaction to what had occurred and her allegedly

inappropriate and unprofessional confrontation of Randall), rather than upon other reasons suggested in the DAS third-step response or in testimony elicited at hearing.

It is undisputed that Barnard had knowledge of the DHS work rules which management concluded she had violated. Similarly uncontroverted is Edgington's testimony that she considered Barnard's employment record, including her consistently positive performance evaluations, in deciding what, if any, discipline to impose.

Barnard argues that the State failed to establish just cause for her discipline because the investigation it conducted was not fair or objective, but was instead targeted to find fault with Barnard. She makes a number of observations in her brief which can reasonably be viewed as supportive of such a conclusion. And, as previously noted, one could surely regard the absence of greater specificity in the disciplinary notice as a failure to adequately communicate the reasons for the discipline to Barnard.

But even assuming that the State's investigation was sufficient and fair, and that the reasons for the discipline were adequately communicated to Barnard, other considerations relevant to a just cause determination warrant the conclusion that just cause for Barnard's five-day suspension was not established by the State.

A preponderance of the credible evidence received at hearing establishes that Barnard lost her composure and loudly confronted Randall in an unprofessional manner when Randall arrived at 103 Cherry in

response to Gibbons' request. One can understand how Barnard could have engaged in this brief-yet-inappropriate outburst under the circumstances. Gibbons had failed to promptly step away from the client's behavior when asked by Barnard and Jacobs, which only exacerbated Barnard's existing unhappiness with nursing staff's perceived lack of sufficient regard for their safety when dealing with clients. And Gibbons' query about whether Jacobs had hit the Client—an action which Edgington acknowledged was inappropriate—as well as her gratuitous and provocative statement to the effect that 103 Cherry was the worst house, were inappropriate and unprofessional.

However, DHS employees are expected to maintain appropriate control of themselves even under provocation, to avoid boisterous or inappropriate behavior, and to treat other employees with dignity and respect, and Barnard failed to do so in this one limited situation. I thus conclude that the State did establish Barnard's breach of DHS work rules D-1(4), D-1(5) and D-1(21) in connection with her interaction with Randall upon the latter's arrival at 103 Cherry.

I reach a different conclusion concerning the "failure to take control of the situation" basis for Barnard's discipline. The record establishes that when confronted with Jacobs' angry outburst, Barnard did endeavor to control the situation by acknowledging to him that Gibbons had acted inappropriately but instructing that Jacobs needed to calm down. She and Owens, who also attempted to calm Jacobs, both thought he was regaining

his composure. And even if the “failed to take control” reason stated in Barnard’s disciplinary notice is to be read so broadly that it also includes Gibbons’ involvement, it is hard to imagine what Barnard could have done with Gibbons beyond what she did—trying to get Gibbons (the trigger for Jacobs’ outburst) away from the Client behavior, and ultimately succeeding.

The State never specifies what Barnard should have done, beyond what she did, in order to “take control of the situation.” The fact that Jacobs became agitated again when he later attempted to contact Gibbons and when he vented his anger and frustration during his meeting with Randall and Wilson—interactions in which Barnard was not involved—cannot fairly be viewed as a failure on her part.

Barnard’s brief loss of composure and inappropriate confrontation of Randall does not constitute just cause for a five-day suspension, especially when consideration is given to DHS’s failure to apply progressive discipline, the disproportionality of the discipline to the offense and DHS’s failure to apply any disciplinary sanction to other employees who also engaged in inappropriate and unprofessional behavior on March 16.

The concept of progressive discipline is embodied in the disciplinary action rules of the Department of Administrative Services. PERB has long recognized that the purpose of employee discipline 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). This goal of correcting perceived employee

deficiencies is reinforced by what was, as of the date of Barnard's discipline, section 11.10 of the State's DAS-prepared Managers and Supervisors Manual, which provided in relevant part:

**Progressive Discipline:** Progressive discipline is the action taken by management to correct or change an employee's behavior. The severity of the discipline increases with the repetition or seriousness of the inappropriate behavior. The specific type of discipline imposed . . . should generally be the least form that will result in the required correction or change. . . .

PERB has recognized that some offenses may be serious enough to justify skipping some of the progressive disciplinary steps ordinarily imposed, or to render principles of progressive discipline entirely inapplicable. *Hoffman & State (Department of Transportation)*, 93-MA-21 at 26. Had Barnard committed such an offense (such as stealing, striking a supervisor or engaging in other workplace violence, or persistently and willfully refusing to obey a legitimate order or directive) principles of progressive and corrective discipline might well be deemed inapplicable. But such is not the case here, where the asserted basis for the discipline was not some willful act of misconduct, but was instead a brief departure from the employee's usual behavior which the State has not even suggested could not be corrected, changed or avoided in the future by the application of a much milder form of discipline. The imposition of a five-day suspension, often considered the penultimate disciplinary sanction, was not consistent with principles of progressive discipline and was not proportionate to the offense committed.

DHS's failure to discipline other employees who behaved inappropriately and unprofessionally on March 16 further supports the conclusion that just cause for Barnard's suspension has not been established.

It is apparent from testimony at hearing that a disagreement exists concerning the proper role of nurses during a client behavior, as well as other aspects of the nurse/client/house staff relationship. But it is also clear that even if Gibbons' involvement in J's behavior and her failure to physically separate herself from it when asked was the proper performance of a duty expected of her, management nonetheless acknowledges her question about whether Jacobs had hit the Client was inappropriate as was, I conclude, her gratuitous and inflammatory comment about 103 Cherry being the worst house.

Edgington considered Gibbons' acknowledgement that she had done something inappropriate as an important factor in making the decision not to impose discipline on her, but does not seem to have given Barnard's reasonably prompt apology to Randall the same consideration or weight.

The record also revealed that Bramer, a RTW subordinate to Barnard, angrily intervened in the interaction between Barnard and Randall, yelling at his superior in the process—inappropriate and unprofessional conduct of the same general type as that in which Barnard engaged, although arguably with less provocation. Yet the report of the investigation contains no conclusions



about the appropriateness of his behavior, and no discipline was recommended or imposed upon him.

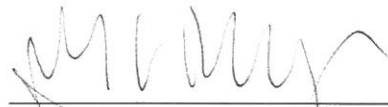
In sum, although Barnard's brief and isolated loss of composure and resulting inappropriate and unprofessional confrontation of Randall did breach DHS work rules, those violations do not constitute just cause for the five-day suspension imposed. Under the totality of the circumstances revealed by the record here, just cause existed for nothing more than the issuance of a written reprimand to Barnard for her brief and uncharacteristic outburst on March 16, 2016. I consequently propose the following

#### ORDER

The State shall rescind and remove the original and all copies of the April 22, 2016, notification of Jenna N. Barnard's five-day suspension, as well as any other documentation of the suspension, from all personnel files maintained concerning Barnard. The State shall also take all other actions necessary to place Barnard in the position she would now be in had she instead been issued a written reprimand on April 22, 2016.

This proposed decision and order will become PERB's final agency action on the merits of Barnard's appeal pursuant to PERB rule 621-9.1 unless, within 20 days of the date below, a party files a petition for review with the Public Employment Relations Board or the Board determines to review the proposed decision on its own motion. PERB retains jurisdiction of this matter in order to address any remedy-related issues which might hereafter arise.

DATED at Des Moines, Iowa, this 13th day of December, 2017.

A handwritten signature in dark ink, appearing to read 'Jan V. Berry', is written over a horizontal line.

Jan V. Berry  
Administrative Law Judge