

FINDINGS OF FACT

Charles Hixson began his employment with the State of Iowa, Department of Corrections (DOC) as a correctional officer at the Mount Pleasant Correctional Facility (MPCF) on June 10, 1988. In 2002, he was promoted to the lieutenant rank and position of correctional supervisor. He was again promoted in rank and position in 2005 to captain and correctional supervisor II. Hixson was a captain at the time he received the written reprimand.

The MPCF operates seven days a week with three shifts for every 24-hour period. The facility is managed by tiered-rank. The MPCF's warden is Jay Nelson who was appointed to the position in October of 2015. Its deputy warden is Gail Huckins. She supervises the MPCF's security director, William Stump. Director Stump manages Hixson and nine other correctional supervisors who are lieutenants and captains. Hixson and the other captains work the first two shifts, rotating shift assignments every six months. Hixson supervises 30 to 40 employees per shift and approximately 140 employees overall. The lieutenants work all three shifts and rotate shift assignments as well.

In July or August of 2015, Director Stump was aware that the lieutenants' job classification as correctional supervisor I and the captains' job classification as correctional supervisor II would merge to one classification, "correctional supervisor." This raised issues concerning their schedules—whether all correctional supervisors, both captains and lieutenants, would work all three shifts and, if so, how often shift rotation would occur. In anticipation of the change, Director Stump emailed all correctional supervisors and asked what work schedules and shift

rotation they wanted once the job classifications merged. He invited their opinions and suggestions. Numerous emails ensued.

Hixson opposed shift rotation for several reasons. He believed shift rotation adversely affected an employee's health. It also affected his personal life. It interfered with his full-time attendance of college classes. Although other employees' work schedules had been adjusted for classes, Deputy Warden Huckins turned down Hixson's request to work the day shift during his last semester. On top of this, Hixson was recently divorced and his child visitation and custody were affected by his ex-spouse's move to Kansas City. He unexpectedly lost his father at the same time. He was under duress from these personal issues.

On October 27, 2015, Hixson worked the 2 p.m. to 10 p.m. shift. He was unable to take time off to watch his daughter's volleyball game by FaceTime because no other supervisors were available. In fact, the shift was short on supervisors. Frustrated, Hixson went to Director Stump's office to vent as Stump had encouraged the correctional supervisors to do. Director Stump had worked at MPCF for 22 years and always maintained an open door policy with the supervisors he managed. Hixson appeared visibly upset and emotional that evening. He confided in Director Stump about his personal issues and, during the course of the conversation, said he was going to get a doctor's note to take leave for six months due to stress and to avoid shift rotation. Director Stump did not believe Hixson was sincere about avoiding shift rotation and knew Hixson valued his job. The director likened his one-on-one conversation with Hixson that evening to many other occasions where officers came to his office to confide in Stump and blow off steam.

Director Stump testified, "I think that's the only way I can do business, yes. That's my style, yes."

The next day, October 28, there was a scheduled supervisors' meeting to discuss the supervisors' views on schedules and shift rotations once the job classifications merged. Deputy Warden Huckins, Director Stump, Hixson, and seven to eight other correctional supervisors were present. The meeting was opened up for everyone to express their opinions. The issues relating to their schedules significantly impacted the group and many supervisors were frustrated or upset. They discussed different ideas and options.

Hixson read empirical data from studies focused on correctional supervisors and their adverse health issues caused by working shift rotations. Director Stump and correctional supervisors present for the meeting characterized Hixson as passionate about the topic. However, that was not unusual for supervisors' meetings. Director Stump testified in part, "[M]ost conversations we have in there with supervisors they have a pretty passionate expression. It's a time when they give their opinion. Most supervisors are pretty passionate about what their opinion is." Nonetheless, no one had received a written reprimand or other disciplinary action due to discussions or behavior in those meetings.

Because they were short on time, the director stopped Hixson's presentation because they were running long on his portion. Hixson left thereafter for a doctor's appointment. It is uncontroverted that, during this meeting, Hixson did not state a refusal to rotate shifts.

A day later, October 29, Hixson sent an email to the executive staff and correctional supervisors and expanded on the shift rotation discussion. He discussed “challenging the process” and engaging in critical dialogue regarding the subject. Hixson addressed other concerns related to shift rotations such as the effect on offenders, the effect on the employees who the officers supervised, and the need for the supervisors to stay proficient at working each shift.

In early November, the correctional supervisors and Director Stump exchanged a number of group emails with suggestions, options, and comments regarding the supervisors’ schedules. They discussed their concerns and whether there should be permanent shifts, a rotation of shifts, a hybrid of permanent and rotating shifts, shift trades, shift bids, and the duration of rotation assignments. Some submitted proposals and they discussed their agreements, disagreements and concerns regarding each option. On November 10, Director Stump emailed the group and stated in relevant part, “I have heard from Hixson, Davison, Lambert and Kreiss. It would be great to hear from you as well.”

Director Stump emailed the group again on November 18. He attached schedule options from the group’s email discussions and asked the supervisors to each pick one. On December 2, Director Stump emailed the group with their selection results to discuss at their upcoming meeting before Stump presented the results to the warden. Although Hixson’s position had not been the most popular at the time of his presentation on October 28, the majority of the supervisors supported Hixson’s position for their schedules effective January 1, 2016.

While the correctional supervisors had continued their schedule discussion following the October 28 meeting, Deputy Warden Huckins sent an email to Warden Nelson two days later, on October 30, 2015. The email prompted the investigation of Hixson and contained the following:

On Wednesday, November 25, 2015 [SIC] there was a supervisors meeting that started at approximately 12:30 p.m. Chuck Hixson asked if he could bring up a topic as he had to leave for a doctor's appointment. Chuck proceeded to state that he has empirical research (explained to us what empirical research was), that rotating shifts is unhealthy, causes stress related illnesses and medical illnesses. During this conversation he made the statement that he is not rotating. Chuck went on for a few minutes and then [Stump] tried to gracefully wrap up Chuck's statements so that we could move on to the next topic.

Thereafter, Warden Nelson requested Russ Ort, the security manager at another DOC facility to conduct an investigation of Hixson with the assistance of MPCF's nursing services director, Becky Johnson.¹ Deputy Warden Huckins provided three documents to Ort when he was assigned to investigate: Huckins' October 30 email to Warden Nelson; Hixson's October 29 email to executive staff and the correctional supervisors; and Director Stump's supervisory notes regarding Hixson's visit to his office on October 27.

On November 16, Ort conducted investigatory interviews of only Hixson and Director Stump. Director Stump had been provided a copy of the deputy warden's email before he was interviewed. Hixson was upset and emotional during his own

¹ Warden Nelson claimed that he initiated the investigation due to comments Hixson allegedly made to him concerning shift rotation when Nelson first became warden. The warden testified that, as a result, he had asked Stump to follow-up with Hixson. However, there is no evidence to indicate that Director Stump followed-up with Hixson in any manner or that the comments were a part of the investigation. The record supports finding the investigation was prompted by the deputy warden's October 30 email to the warden with the claim that during the course of the supervisors' October 28 meeting, "[Hixson] made the statement that he is not rotating."

interview. Hixson admitted to making certain statements—that he would get a doctor’s note for extended leave due to stress and to avoid shift rotation. Hixson went on to explain that it was never his intent to carry through on that action and he had only been venting to Director Stump when he made the comments. Ort did not believe it necessary to interview others for his investigation because Hixson admitted to making the statements to Director Stump.

Ort concluded his investigation on December 1, 2015, and submitted a written report to the warden. In his report, Ort indicated the investigation was due to “allegations that Mr. Hixson had made several statements that may be insubordinate.” “The first being on 10/28/15 during a supervisory meeting that he would not rotate shifts and later in Mr. Stump’s office he was not going to rotate anymore but go on six month leave for stress issue.”

The report included text from an email Hixson sent to Director Stump on September 19, 2014. In the email, Hixson informed Director Stump that he had not received an investigator position, was taking a leave of absence, and could no longer endure the stress of the second shift. Also included in Ort’s report was the text of a note written by Director Stump regarding Hixson’s visit to his office on October 27, 2015. The director noted Hixson had a loud tone and indicated he would get a doctor’s note to avoid his six-month rotation. There was nothing in the note indicating Director Stump had forewarned or notified Hixson that he considered Hixson’s discussions or behavior inappropriate. The director never shared his supervisory notes with employees or placed them in personnel files.

Ort concluded Hixson had admitted to making the statements, but only to vent. Ort wrote in part, "That he had no intention of following through and his history would support this." Ort went on and raised the question of how long others would have to put up with Hixson's venting and opined Hixson's threats were inappropriate. Ort indicated Hixson's duties had not suffered. Because Ort believed Hixson needed help, he and Johnson had recommended EAP to Hixson during the investigation.

Ort was unable to find any evidence where Hixson had been given notice to end the behavior and noted that it had been tolerated for over a year. Nonetheless, Ort found the following allegation substantiated, "Correctional Supervisor Charles Hixson while on duty engaged in boisterous or inappropriate discussions and did not treat others with common courtesy." Ort outlined the evidence relied on as (1) Deputy Warden Huckins' October 30 email to the warden with a copy to Director Stump, " ... giving the detailed information on statements made by Charles Hixson at a security supervisors meeting on Oct. 28, 2015;" (2) Hixson's October 29 email to the executive staff and correctional supervisors; and (3) AD-PR-11 Iowa Department of Corrections General Rules of Employee Conduct: Rule 21-Demeanor. Although Ort relied on the deputy warden's October 30 email as evidence, he did not indicate in the report that the email contains an untrue allegation that "[Hixson] made the statement that he is not rotating," during the course of the supervisors' meeting.

Warden Nelson determined to issue a written reprimand to Hixson. The reprimand, dated December 7, 2015, provided in part:

. . . .
The investigation completed on December 1, 2015 shows that you were in violation of MPCF General Rules of Employee conduct AD-PR-11, rule #21 Demeanor, which reads in part “while on duty, employees will avoid boisterous or inappropriate discussions and behavior and will treat others with common courtesy.”

Specifically, your behavior in more than one incident was found to be unprofessional and in direct conflict with expectations of your position. Your behavior in these incidents undermines your credibility and leadership as a Correctional Supervisor. You are expected to conduct yourself in a manner which is respectful and professional at all times.

. . . .
The reprimand did not describe or list the dates or other specifics of “in more than one incident.” Hixson met expectations in his evaluation preceeding the reprimand. He had no prior disciplinary history in his previous 27 years of employment. Director Stump testified that he personally would not have disciplined Hixson.

CONCLUSIONS OF LAW

Pursuant to Iowa Code section 8A.415(1), for state employee grievance appeals, PERB’s decision “shall be based upon a standard of substantial compliance with this subchapter [subchapter IV of chapter 8A] and the rules of the department [of administrative services].” For an employee to prevail in a grievance appeal before PERB under this standard, the employee must establish a lack of substantial compliance by the State with Iowa Code chapter 8A or department of administrative services (DAS) rules. *Stratton and State (Dep’t of Human Servs.)*, 93-MA-13 at 8. In section 8A.415(1) appeals, the grievant has the burden to establish the State failed to substantially comply with the cited statute or rule. *Studer and State (Dep’t of Human Servs.)*, 98-MA-12 at 9.

Hixson claims the State did not substantially with DAS rule 11–60.2(8A) because there was not just cause to support the issuance of the written reprimand. The relevant DAS rule provides:

11–60.2(8A) Disciplinary actions. Except as otherwise provided, in addition to less severe progressive discipline measures, any employee is subject to any of the following disciplinary actions when the action is based on a standard of just cause: suspension, reduction of pay within the same pay grade, disciplinary demotion, or discharge. Disciplinary action involving employees covered by collective bargaining agreements shall be in accordance with the provisions of the agreement. Disciplinary action shall be based on any of the following reasons: inefficiency, insubordination, less than competent job performance, refusal or a reassignment, failure to perform assigned duties, inadequacy in the performance of assigned duties, dishonesty, improper use of leave, unrehabilitated substance abuse, negligence, conduct which adversely affects the employee’s job performance or the agency of employment, conviction of a crime involving moral turpitude, conduct unbecoming a public employee, misconduct, or any other just cause.

Therefore, disciplinary action is based on a standard of just cause; just cause must exist to support the disciplinary action taken. In the absence of a definition of “just cause,” PERB has long considered the totality of circumstances and rejected an inflexible application of fixed elements in its determination of whether just cause exists. *Wiarda and State (Dep’t of Human Servs.)* 01-MA-03 at 13-14 appendix. Examples of factors which may be relevant to a just cause determination, depending on 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 there is sufficient proof of the employee’s guilt of the offense; 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 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. *Gleiser and State (Dep't of Transp.)*, 09-MA-01 at 16-17.

PERB also considers the treatment afforded other, similarly situated employees relevant to a just cause determination. *Woods and State (Dep't of Inspects. and Appeals)*, 03-MA-01 at 4. All employees who engage in the same type of misconduct must be treated essentially the same unless a reasonable basis exists for a difference in the punishment. *Id.*

In this case, the reprimand is void of specifics of how Hixson allegedly violated Rule 21 "in more than one incident." Based on the investigation report, the incidents seemingly refer to his discussions in: the director's office on October 27, the supervisors' meeting on October 28, and his email dated October 29. There is also an older email, dated September 19, 2014, referenced in the investigation report.

Hixson argues there was an absence of just cause to support the State's issuance of a written reprimand to him. Hixson asserts he was not given sufficient notice of the expected conduct and rule allegedly violated; the State did not conduct a fair investigation; there is not sufficient proof of his guilt of the offense; there were other mitigating circumstances which were not taken into consideration and other employees were not disciplined for similar conduct.

For the following reasons, I conclude there was an absence of just cause to support the issuance of the reprimand. Thus, the State did not substantially comply with DAS rule 11–60.2(8A).

A. Lack of Notice.

As reflected in Ort’s investigation report, Hixson was not given notice to end the behavior and it had been tolerated for the year leading up to the written reprimand. Neither the warden nor the deputy warden nor the security director forewarned Hixson that they considered his shift rotation discussions and emails boisterous or inappropriate and in violation of AD-PR-11, Rule 21. If in fact management found Hixson’s communications on this issue inappropriate at all, they should have taken the time to communicate their concerns and expectations to Hixson. This would have provided an opportunity for Hixson to curb his communications and successfully meet their expectations. Instead, Hixson was essentially lulled into a false sense of security that Director Stump was a safe haven for confidential communications and blowing off steam. By Director Stump’s own testimony, the director maintained an open door policy for the correctional supervisors and “that’s the only way [he] can do business”

Moreover, the rule allegedly violated by Hixson does not, in and of itself, provide sufficient notice of prohibited conduct. The rule provides, “while on duty, employees will avoid boisterous or inappropriate discussions and behavior and will treat others with common courtesy.” The rule is wholly subjective and does not provide specific or even general guidance as to the types of discussions and behavior that management will consider boisterous or inappropriate or

discourteous. Neither the rule allegedly violated nor Hixson's supervision provided sufficient notice that management considered Hixson's shift rotation discussions boisterous or inappropriate.

B. Insufficient investigation.

The State did not conduct a sufficient and fair investigation. Given the subjective nature of the rule Hixson allegedly violated, a more thorough investigation was warranted of what is "appropriate" at the facility and whether Hixson's shift rotation discussions in comparison were boisterous or inappropriate under the circumstances.

Ort relied only on his interview with Director Stump, who had been provided information ahead of the interview; Hixson, who was upset during the interview; and Hixson's emails. Ort did not interview the correctional supervisors who were present for the supervisors' meeting to confirm or deny the deputy warden's allegations concerning Hixson or to gain their perspectives on the merger of job classifications and related schedule and shift rotation issues. The other correctional supervisors could have provided some context to Director Stump's open door policy and whether it was an appropriate or inappropriate venue to blow off steam or vent as Hixson had done. Additionally, Ort did not include in his investigation the numerous emails from other correctional supervisors regarding shift rotation and schedules.

Hixson's statements were not made in a vacuum, but in the context of a charged atmosphere with colleagues who were also frustrated and upset. A more thorough investigation would have revealed critical information about the context

and circumstances of Hixson's statements to assess their appropriateness. However, it should be noted that the investigator was diligent in identifying some issues, lack of notice and an EAP referral for Hixson, which should have been identified and addressed by management without an investigation. In any event, the State failed to conduct a sufficient and fair investigation to determine whether Hixson's shift rotation discussions and emails were appropriate under the circumstances.

C. Inadequate communication of the reasons for discipline/
Insufficient proof of guilt.

The State did not adequately communicate the reasons for the written reprimand and there is insufficient proof that Hixson engaged in boisterous or inappropriate discussions. The written reprimand indicates that Hixson violated AD-PR-11, Rule 21, but does not specify the basis for finding the rule violation. The reprimand only refers to Hixson engaging in "unprofessional" "behavior" "in more than one incident." The reprimand does not reference dates of the incidents; it does not contain descriptions of the incidents; and it does not set forth what part of Hixson's discussions they considered boisterous or inappropriate.

Notwithstanding the lack of specificity, the tangential incidents (referred to or relied upon in the investigation) are seemingly: (1) Hixson's visit to Director Stump's office on October 27; (2) the supervisors' meeting on October 28; and (3) Hixson's email dated October 29 to the executive staff and other correctional supervisors; and (4) Hixson's September 19, 2014, email to Director Stump. There is insufficient proof that Hixson violated Rule 21 on these occasions.

First, Hixson's discussion in Director Stump's office on October 27 was appropriate under the circumstances. Hixson acted in accord with Director Stump's open door policy when he went there to confide in Stump. Although Hixson may have had a loud tone, the discussion can't be described as boisterous when the director described it as a one-on-one private conversation. The director likened this conversation to many other past conversations between Stump and the officers he supervised. It was only in this context that Hixson made statements about getting a doctor's note due to stress and to avoid shift rotation. The director did not take Hixson's statements as a sincere threat. Director Stump viewed Hixson's statements about shift rotation as none other than a form of venting. There is insufficient proof that Hixson's discussion was boisterous or inappropriate on this occasion such that it violated AD-PR-11, Rule 21.

Next, Hixson was passionate in the supervisors' meeting, but his presentation was relevant to the discussion at hand and appropriate for the October 28 meeting. It is uncontroverted that Hixson did not state a refusal to rotate shifts in the meeting as originally alleged by the deputy warden in her October 30 email. The allegation contained in the deputy warden's email was false, but still listed in the investigation report as evidence relied upon for Ort's conclusions. Hixson presented empirical data and left for an appointment. There is insufficient proof that his discussion that day was boisterous or inappropriate such that it violated AD-PR-11, Rule 21.

Third, Hixson's October 29 email to the executive staff and other correctional supervisors was a follow-up to the schedule discussion and appropriate under the

circumstances. He addressed relevant factors affected by the supervisors' schedule—offenders, employees who they supervise, and the supervisors' proficiency at working each shift. Director Stump and the correctional supervisors exchanged a number of group emails till mid-December on the subject. Other than perhaps copying the executive staff in on his email and it being longer in length, Hixson's October 29 email was similar to the other group emails. There is insufficient proof that Hixson's email communication was boisterous or inappropriate such that it violated AD-PR-11, Rule 21.

Finally, the last document, Hixson's September 19, 2014, email to Director Stump, was written over a year before the investigation began. If the director had considered the email inappropriate, he should have talked to Hixson about it rather than keep it and use it as a "gotcha." If anything, the email is relevant to lack of notice. From the time of that email to the date of the reprimand, the director had not sat down with Hixson and talked about his shift rotation communications—assuming there was a pattern of venting by Hixson. But over a year had lapsed from the first occasion in September 2014 to October 2015, when the issue re-emerged due to the job classifications' merger and duress felt by Hixson. This was not a pattern or violation of AD-PR-11, Rule 21, but an annoyance perhaps felt by management.

In sum, there is insufficient proof that Hixson engaged in boisterous or inappropriate discussions in violation of AD-PR-11, Rule 21 on any one of the above occasions.

D. Employment record and other mitigating circumstances.

The State failed to give due consideration to Hixson's 27-year tenure without any record of disciplinary action, the charged atmosphere surrounding the merger of the job classifications, and the duress Hixson was under due to personal reasons. Ort noted that Hixson's duties had not suffered. Director Stump knew Hixson valued his job. Director Stump also did not believe discipline was warranted in this case. As Hixson's supervisor, Stump's opinion should be afforded deference. Additionally, regard should be given to the effect any discipline may have on Director Stump's open door policy and his relationship with the officers he supervises. Finally, other correctional supervisors who had been passionate and emotional at times had not been subject to disciplinary action. All of these circumstances mitigate any disciplinary action that may otherwise be warranted for Hixson's discussions concerning shift rotation.

E. Summary.

The State failed to give notice to Hixson that his shift rotation communications were considered boisterous or inappropriate such that they violated AD-PR-11, Rule 21; the State failed to conduct a sufficient and fair investigation; and the State failed to adequately communicate the reasons for the written reprimand to Hixson. Although Hixson was very vocal, passionate, and emotional in his communications regarding shift rotations, his discussions were appropriate under the circumstances of each occasion. There is insufficient proof that these discussions were boisterous or inappropriate in violation of Rule 21. Finally, Hixson's employment record and other factors mitigate the issuance of a

written reprimand to Hixson. In consideration of the totality of these circumstances, there was not just cause to support the issuance of the written reprimand. Thus, in the absence of just cause, Hixson established the State failed to substantially comply with DAS rule 11–60.2(8A). I consequently propose the following:

ORDER

The State shall rescind and remove the original and all copies of the December 7, 2015, written reprimand issued to Charles Hixson, as well as any other documentation of the written reprimand, from all personnel files maintained concerning Hixson.

This proposed decision and order will become PERB final agency action on the merits of Hixson'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 hereinafter arise.

DATED at Des Moines, Iowa, this 8th day of February, 2018.



Diana S. Machir
Administrative Law Judge