

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

BRIAN KELLEY, Appellant,)	CASE NO. 102154
and)	
STATE OF IOWA (DEPARTMENT OF CORRECTIONS), Appellee.)	PROPOSED DECISION AND ORDER

Appellant, Brian Kelley, filed a state employee disciplinary action appeal with the Public Employment Relations Board (“PERB”) pursuant to Iowa Code section 8A.415(2)(b) and PERB rule 621—11.2. Kelley appeals the third-step response of the director of the Iowa Department of Administrative Services (DAS) denying his appeal of his termination.

Kelley worked as a correctional officer for the Iowa Department of Corrections (DOC) at the Anamosa State Penitentiary (ASP). Kelley alleges the State did not have just cause to terminate his employment on December 12, 2017. The State denies that Kelley’s termination was not supported by just cause.

A closed evidentiary hearing was held on November 15, 2018. Robin White represented Kelley. Andy Hayes represented the State. The parties submitted post-hearing briefs on January 18, 2019. Andrew Hayes has subsequently withdrawn as counsel and the State is now represented by Alla Mintzer Zaprudsky. After considering the evidence and the arguments of the parties, I propose the following:

FINDINGS OF FACT

Kelley began working as a correctional officer for the State in July 1998 in Newton. Kelley then moved to the Anamosa State Penitentiary in March 1999. Prior to working for the State, Kelley worked as a security supervisor at two casinos. He also served in the Marine Corps. Kelley is also active in the Masonic Lodge. During the time relevant to this appeal Kelley served as a vice president at one local chapter of the Masons and served as the equivalent of the president at another local chapter.

Kelley has worked for the State for almost twenty years. Over the course of his tenure, he received three written warnings, two for being tardy and one for a security breach. Kelley's evaluations are not in the record. Kelley signed a document in 1999 stating that he read and understood the Iowa State Men's Reformatory Rules of Employee Conduct. Kelley attended a two-hour class in April 2017 regarding the Work Rules Code of Conduct.

In May 2017, Kelley met Jacob Helm through his association with the Masons. Helm is a tattoo artist that owns his own company. Helm petitioned to join the Masonic Lodge at that time. Kelley spoke with Helm and understood Helm was a former offender. As Kelley was a leader in the Masons organization he searched for Helm on the Iowa Courts website and discovered Helm had been convicted of a felony. Kelley then searched for Helm on the DOC's ICON system.

The ICON system is a DOC database that contains offender records. These records may include confidential information. Correctional officers and

parole officers would use this system to write reports and updates. If a person has active entries in the ICON system that means the person is still under DOC supervision. When accessing the ICON system, a user would see the following confidentiality statement:

Offender information is confidential, unless otherwise specified by Iowa Code Section 904.602. Staff should only access information which is necessary to do their job. All activities are recorded and audited. Unauthorized access or dissemination of material may result in a criminal prosecution pursuant to Iowa Code Section 904.602(11).

The record indicates Kelley searched the generic notes section of Helm's records in the ICON system on May 10, 2017. At the time of Kelley's first investigative interview he admitted to searching Helm's records on ICON to review Helm's behavior while he was incarcerated. At a later interview and in testimony Kelley said he not only was searching Helm's records to review Helm's behavior, but also to find Helm's number. Kelley stated he planned to include the number in a report for his supervisors describing his ongoing association with Helm as required by DOC policy.

At the time Kelley searched the generic notes in Helm's records on ICON, those records contained entries of office visits with the probation officer from May 8, April 27, and April 10 of that year. There was also an entry of the results of drug tests on April 29. In Kelley's interview, he stated he read through the generic notes, but did not review the page that specifically stated Helm was on parole. Kelley admitted in his investigatory interview that he should have realized Helm was still under DOC supervision when he reviewed

Helm's records on ICON, but claims he did not make the connection since he was only reading the notes to see whether Helm's behavior had improved. Kelley claims he did not realize Helm was under DOC supervision until November 15 when Helm asked him to meet with his parole officer. Kelley also stated that he did not believe using the ICON system was wrong even though it was for personal use because he was not disclosing the information.

Although Kelley stated one of the reasons for accessing the ICON system was to find Helm's number for a report, Kelley never reported his ongoing relationship with Helm to his supervisors. DOC policy requires all contact with offenders and former offenders to be reported to the warden. Even incidental contact with offenders or former offenders needs to be reported. A basic training concept in corrections is that inappropriate relationships and inappropriate nonprofessional interactions with offenders or former offenders may compromise a person's ability to do one's job. If a correctional officer reports ongoing contact with an offender or former offender, the DOC would block that officer from accessing the offender's account on ICON. The DOC would also have someone meet with the correctional officer to talk through "rules of engagement" or a plan going forward regarding contact with that individual. Kelley admits he knew this policy, has reported other relationships, but failed to report his ongoing relationship with Helm.

During his ongoing relationship with Helm, Kelley also received a discounted tattoo from Helm. Helm offered free or discounted tattoos to all Masons due to his association with the organization. Kelley utilized the offer to

obtain a large tattoo on his upper right arm. Kelley paid \$100 or \$200 for the tattoo. The market value cost of the tattoo would have been significantly higher, possibly close to \$800. Kelley admitted that receiving the tattoo from Helm was wrong. He was not thinking as a correctional officer should think when he accepted Helm's offer.

Kelley's relationship with Helm was discovered by his supervisors at ASP following an incident on November 15, 2017. Helm arrived at the Dubuque residential facility to talk to his parole officer, Lauri Waldbillig, about permission to travel to Des Moines for a Masons' event. Waldbillig told Helm she needed verification for his travel and denied his request. Helm became upset and told her he had two correctional officers from Anamosa coming to vouch for him. Waldbillig informed Helm that she would not be able to meet with those persons. She was unable to meet with anyone due to her schedule.

At some point, Helm contacted both Kelley and another correctional officer from ASP, Shawn Evarts. Kelley was on his way home from work when he received Helm's call. At the hearing and in the Loudermill interview Kelley claimed Helm told him he needed Kelley to speak to his parole officer about getting permission to travel to Des Moines for a Masons' event. Kelley claims he was going to explain about the Masons organization. However, during the initial interview in the investigation, Kelley stated he received a phone call from Helm stating he was in trouble for his roommate having wine in Helm's place of residence and Helm asked for Kelley to come to vouch for him.

Both Kelley and Evarts arrived at the Dubuque residential facility. While at the residential facility Kelley was wearing his work uniform, but had a black sweatshirt over the uniform. Helm was on the phone when Kelley arrived. After the phone call, Helm, Evarts, and Kelley went outside to talk. Kelley claimed he believed he was there to talk to the parole officer about the Masons and why Helm was asked to attend. He claims he never planned on using his authority as a correctional officer during the discussion.

Waldbillig was informed by staff that two correctional officers in uniform were in the lobby waiting to meet with her. Waldbillig did see the individuals in passing, but did not interact with them.

Kelley was at the residential facility for about an hour. After Helm was calmer and Helm realized the parole officer was not going to speak with them, Kelley left.

Waldbillig reported the November 15 incident to her direct supervisor and to Warden Sperfslage with ASP as the incident involved two correctional officers from ASP. Waldbillig told Sperfslage she observed two correctional officers in the lobby advocating on behalf of one of her clients. Due to Waldbillig's report, Sperfslage opened an investigation and Lorne Cullen was assigned to investigate. Kelley was suspended on December 5, 2017¹ pending outcome of the investigation. Cullen's investigatory interview with Kelley took place the same day.

¹ This letter is incorrectly dated December 5, 2016.

Throughout the investigation Kelley maintained he was unaware that Helm was under DOC supervision until the November 15th incident. Cullen did not find Kelley to be forthcoming during the investigation.

The DOC conducted a Loudermill interview on December 12. In that interview Kelley stated the reason he went to the Dubuque residential facility on November 15 was merely to discuss the Masons, and was not to vouch for Helm. He reiterated that he did not know, prior to that day, that Helm was on probation.

Warden Sperfslage and the leadership group at ASP discussed the potential rule violations and appropriate discipline for Kelley. Sperfslage also discussed this with the appropriate chain of command in Des Moines. Sperfslage testified that these groups considered the just cause analysis for corrective action. In this particular case, the supervisors considered that Kelley did not have one single violation, but had multiple serious violations of the rules. Sperfslage stated that a correctional officer's position is based on that person's integrity and ethics, and a correctional officer cannot effectively perform his or her duties with integrity and ethics in doubt. The State ultimately concluded that termination was appropriate.

The State terminated Kelley's employment on December 12, 2017, for violations of DOC work rules. The termination letter states that termination is a result of Kelley's actions on November 15, 2017, when he "went to the work release center in Dubuque while in ASP correctional officer's uniform to attempt to speak with a probation officer regarding an offender currently under

supervision in an effort to vouch for offender's character." The letter also says the termination is as a result of Kelley's lengthy, ongoing unreported contact with the offender, use of the ICON system to examine the offender's records without a need to know that information for official duties, and Kelley's receipt of a gift or item of value from the offender. In the termination letter, the State cites several DOC rules it claims Kelley violated due to the above actions. Those rules are²:

E. Personal Ethics

Employees Shall:

1. Conduct themselves in a professional manner that creates and maintains respect for the IDOC and individuals served.
2. Avoid any action that might adversely affect the public confidence in the state criminal justice system.
3. Not use their official position to secure special privilege or advantage.
8. Cooperate fully and truthfully in oral statements, official documents, inquiries, investigations, and/or hearings. Employees may not withhold information or impede any of these processes.
9. Not give nor receive cash or articles from former or current offenders, family members, or person(s) acting on the behalf of a current or former offender; nor may employees trade in any way with offenders. The Warden or District Director (depending on your work location) must approve any exception in advance.

F. Information and Communication

Employees Shall:

1. Use and disseminate offender information only between authorized staff for approved security or professional use.
5. Not have any unauthorized association or unofficial communication with current offenders or former offenders and their families or any other person acting on behalf of the offenders or former offenders. When such contacts or communication occurs, employees are required to submit a written report to their supervisor on the first workday following the contact. Ongoing employee contacts with current offenders, former offenders, their families, or close associates shall be limited to those persons with

² The State also cited two general provisions of the Code of Conduct which require personnel to follow established regulations and procedures and comply with applicable work rules, orders, policies and procedures, and rules and laws.

whom the employee was acquainted or associated with prior to the offender's entry into the IDOC institution or facility. In such cases, the employee is required to advise the Warden, in writing, of the nature, extent, and history of the relationship.

In the termination letter, the State also claims Kelley's actions were not compliant with Iowa Code section 904.602, which states that certain specified information, which includes medical, psychiatric or psychological information and a person's home street address among other information, of persons that received services from the DOC "is confidential and shall not be disseminated by the department to the public." Iowa Code section 904.602(2). The law continues, in part, that the information identified as confidential "shall not be disclosed or used by any person or agency except for the purposes of the administration of the department's programs of services or assistance."

The State found Kelley had violated the above rules and law and terminated his employment due to what the State found to be multiple, serious violations that threatened Kelley's integrity and ethics as a correctional officer.

Kelley filed a state employee grievance form with DAS on December 19, 2017, claiming he was terminated without just cause and requesting to be made whole. Following the third-step grievance meeting, the DAS director's designee denied Kelley's grievance on February 13, 2018, concluding that termination was warranted and supported by just cause.

Kelley filed the present appeal February, 20, 2018.

CONCLUSIONS OF LAW

Kelley filed this appeal pursuant to Iowa Code section 8A.415(2), which states:

2. Discipline Resolution

a. A merit system employee . . . who is discharged, suspended, demoted, or otherwise receives a reduction in pay, except during the employee's probationary period, may bypass steps one and two of the grievance procedure and appeal the disciplinary action to the director within seven calendar days following the effective date of the action. The director shall respond within thirty calendar days following receipt of the appeal.

b. If not satisfied, the employee may, within thirty calendar days following the director's response, file an appeal with the public employment relations board . . . If the public employment relations board finds that the action taken by the appointing authority was for political, religious, racial, national origin, sex, age, or other reasons not constituting just cause, the employee may be reinstated without loss of pay or benefits for the elapsed period, or the public employment relations board may provide other appropriate remedies.

DAS rules provide specific discipline measures and procedures for disciplining employees.

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

. . . .

60.2(4) Discharge. An appointing authority may discharge an employee. Prior to the employee's being discharged, the appointing authority shall inform the employee during a face-to-face meeting of the impending discharge and the reasons for the discharge, and at that time the employee shall have the opportunity to respond. A

written statement of the reasons for the discharge shall be sent to the employee within 24 hours after the effective date of the discharge, and a copy shall be sent to the director by the appointing authority at the same time.

The State bears the burden of establishing that just cause supports the discipline imposed. *Phillips and State of Iowa (Dep't of Human Res.)*, 12-MA-05 at App. 11. The term "just cause" when used in section 8A.415(2) and in administrative rule is undefined. *Stockbridge and State of Iowa (Dep't of Corr.)*, 06-MA-06 at 21 (citations omitted). Determination of whether management has just cause to discipline an employee requires case-by-case analysis. *Id.* at 20.

When determining the existence of just cause, PERB examines the totality of the circumstances. *Cooper and State of Iowa (Dep't of Human Rights)*, 97-MA-12 at 29. The Board has stated the 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 and State of Iowa (Dep't of Emp't Servs.)*, 90-MA-13 at 40. Although just cause requires examination on a case-by-case basis to determine just cause, the Board has declared that the following factors may be relevant to the just cause determination:

While there is no fixed test to be applied, examples of some of the types of factors which may be relevant to a just cause determination, depending on the circumstances, include, but are not limited to: whether the employee has been given forewarning or has knowledge of the employer's rules and expected conduct; whether a sufficient and fair investigation was conducted by the employer; whether reasons for the discipline were adequately

communicated to the employee; whether sufficient evidence or proof of the employee's guilt of the offense is established; whether progressive discipline was followed, or not applicable under the circumstances; whether the punishment imposed is proportionate to the offense; whether the employee's employment record, including years of service, performance, and disciplinary record, have been given due consideration; and whether there are other mitigating circumstances which would justify a lesser penalty.

Hoffmann and State of Iowa (Dep't of Transp.), 93-MA-21 at 23. The Board has also considered how other similarly situated employees have been treated.

Kuhn and State of Iowa (Comm'n of Veterans Affairs), 04-MA-04 at 42.

PERB has determined the presence or absence of just cause rests on the reasons stated in the disciplinary letter. *Eaves and State of Iowa (Dep't of Corr.)*, 03-MA-04 at 14. Iowa Code section 8A.413(19)(b) and DAS rule require the State to provide the employee being disciplined with a written statement of the reasons for the discipline. See *Hunsaker and State of Iowa (Dep't of Emp't Servs.)*, 90-MA-13 at 46, n.27. In order to establish just cause, the State must demonstrate the employee is guilty of violating the work rule, policy, or agreement cited in the termination letter. *Gleiser and State of Iowa (Dep't of Transp.)*, 09-MA-01 at 17-18, 21.

Kelley violated DOC work rules.³ Kelley admits to accessing the ICON system to search for Helm to learn about Helm's behavior while he was incarcerated. Kelley also later claimed he accessed the system to find Helm's number to write a report, which may be a valid professional purpose for

³ The State also claims Kelley's actions violated Iowa Code section 904.602. The State has not discussed or shown the particular information accessed by Kelley that would be classified as confidential under the statute and prohibited from disclosure or personal use. As such, I will refrain from any discussion on a potential violation of the statute.

accessing the system, but always maintained he accessed the ICON system for personal reasons. Because Kelley accessed the system for personal reasons, Kelley violated rule F1 which requires DOC personnel to use offender information only for approved security or professional use. Kelley contends he did not realize at the time that his use of the ICON system was inappropriate as he was not disclosing the information. The rule clearly mentions both the use and the dissemination of information in the ICON system as rule violations. Further, the ICON system itself has a warning statement as someone would log in that states that personnel should only access the information necessary to perform their job. Kelley knew or should have known that his use of the ICON system was a violation of DOC rules.

In accessing an offender's records to review that person's behavior while making an assessment of that person's fitness to be included in the Masons, Kelley also violated DOC rule E3. This rule states that personnel shall not use their official position to secure special privilege or advantage. Kelley had already searched the Iowa Courts online to find out more information about Helm. When that did not reveal the information he wanted, he used his position as a correctional officer to access the ICON database and find out the additional information he desired. An ordinary person would not have access to this ICON system. Kelley used his professional position as a correctional officer to search a system in order to determine whether an individual who happened to be a former offender was fit to join the Masons, an organization in which Kelley was personally involved. Kelley overstepped his authority in his use of

the ICON system, and used it to advantage an organization in which he was personally involved.

Kelley also admits to failing to report his ongoing relationship with Helm. Kelley began his relationship with Helm around May 2017. This relationship continued through the time of his termination. At no point during this relationship did Kelley report the ongoing contact. Kelley admits to knowing that he should have reported his relationship with Helm and has reported contact with others due to this DOC policy. Kelley states that he erroneously believed he had already submitted a report. In failing to report this lengthy, ongoing contact, Kelley violated F5 of the DOC rules and policies, which discusses unauthorized association with current or former offenders and the necessity of reporting such contact.

Kelley also violated DOC work rules when he accepted a tattoo from a Helm for a discounted rate. Kelley received the discount because he was in the Masons, but nonetheless, he received the tattoo from a former offender in violation of E9. This work rule prohibits employees from receiving articles from former offenders. Kelley signed a document stating that he received past DOC rules and he had taken a two-hour course on the rules in 2017. Whether this particular topic in the rules was covered in that training or in the prior work rules is unknown. However, Kelley acknowledges that his actions were wrong and he should have known better. He claims he was not thinking as a correctional officer when he accepted the discount on that tattoo. Kelley's failure to recognize the problem with receiving this tattoo from Helm further

highlights the importance of reporting ongoing relationships with former offenders. Had Kelley reported his ongoing contact with Helm, someone in management at ASP could have worked with Kelley on the limitations of that relationship.

Kelley violated DOC rules when he went to the Dubuque residential facility on November 15, in uniform, to speak with Helm's parole officer. Kelley received a phone call from Helm on November 15 and immediately drove to Dubuque to assist Helm. As Kelley was just leaving work, he had his uniform on, but the uniform may not have been recognizable as that of a correctional officer since he was wearing a black sweatshirt over the shirt. Kelley's purpose, outside of assisting Helm and speaking to Helm's parole officer, is unclear from the record. Initially, Kelley stated that Helm was in trouble as his roommate had wine in Helm's apartment. Later Kelley stated that Helm was trying to gain travel permission to attend a Masons' event in Des Moines and Kelley was merely going to explain the Masons organization and why Helm needed to attend the event. Despite not knowing the true purpose of the conversation Kelley intended to have with Helm's parole officer, Kelley's actions are troubling. Kelley went to assist a former offender, an offender that was still under the supervision of the DOC, in a correctional setting.

Through his actions, Kelley failed to create and maintain respect for the IDOC and his actions could have adversely affected the public confidence in the state criminal justice system. A correctional officer, regardless of whether they are wearing a uniform or invoking their status as a correctional officer should

not be vouching for an offender in any capacity. Although Kelley now claims he was not vouching for Helm's character, he was still vouching for Helm's goal of attending the Masons' event. Kelley's actions were in violation of the rules.

Although Kelley may not have invoked his status as a correctional officer and may have been unrecognizable as a correctional officer when he arrived at the Dubuque residential facility, Helm had already told the parole officer that he had correctional officers arriving. So even though Kelley may not have used his official position to secure an advantage or special privilege, Helm did invoke Kelley's official position to attempt to gain an advantage. This incident demonstrates how dangerous the relationship that Kelley had cultivated really was. Kelley's attempt to help someone he had a relationship with impacted the relationship between ASP and the First Judicial District. The parole officer did not meet with Kelley, but was told that a correctional officer was coming, and saw that a correctional officer from ASP actually did arrive to assist Helm. That places ASP in a bad light, fails to maintain respect for the IDOC, ASP in particular, and could have adversely affected the public confidence in the state criminal justice system when a correctional officer is vouching for a former offender. The fact that Kelley did not realize the seriousness of his actions in assisting Helm by attempting to vouch for Helm's goal of attending a Masons' event is concerning. Kelley should have understood the basic tenets provided to correctional officers that require limited contact between correctional officers and offenders or former offenders, hence the need for reporting. He should have

recognized this situation as a potential rule violation based on his training as a correctional officer including the course he took in April 2017.

Kelley also violated DOC rules when he lied during the investigation. Kelley changed his story about his reason for going to the Dubuque residential facility on November 15. During his first interview on December 5, Kelley stated it was because Helm called and was in trouble for his roommate having wine in Helm's place of residence and Helm asked for Kelley to come vouch for him with his parole officer. In the Loudermill interview Kelley said Helm called on and wanted Kelley to explain the Masons organization and the reason for Helm's attendance at a Masons' event to his parole officer so he would be issued permission to travel. So first, Kelley said he was going to vouch for Helm and later Kelley said he was going to vouch for the Masons organization.

The State also claims that Kelley lied about how long he knew Helm and whether he knew Helm was on parole. Neither of these facts are material to the proceeding as Kelley violated the rule regardless of whether Helm was on parole and regardless of how long Kelley had known Helm. In the December 5 interview Kelley initially stated he knew Helm a few months, but through the course of the interview said he met Helm six months prior to the interview. Kelley also maintains throughout his interview and in testimony that he did not realize Helm was on parole until November 15 even though the records Kelley accessed on ICON clearly showed that Helm was on parole. The State has not demonstrated Kelley lied about these two facts, but Kelley did not cooperate

fully as he was vague about the duration of his relationship with Helm and willfully ignorant of Helms' status as a parolee.

During the investigation Kelley was given an adequate opportunity to explain the circumstances of the incidents at issue. Although the State has not demonstrated the thoroughness of the investigation, Kelley was shown the documents and other information obtained by the DOC during his initial interview and was later given another chance to respond to the allegations. The investigator did not make the final determination about the appropriate discipline. After being presented with the results of the investigation, the management of DOC determined what they felt was the appropriate discipline after an examination of the just cause factors.

In this case, Kelley does not argue that the DOC rules are unreasonable or that he had inadequate warning about the rules. Further, Kelley does not take issue with the investigation conducted in this case. The crux of the dispute in this case is whether Kelley received disparate treatment and whether the discipline was appropriate considering the circumstances of Kelley's lengthy employment history, lack of substantial past discipline, and the alleged violations at issue.

The State did take the just cause factors into account when determining the level of discipline to issue in this case. One of the factors to consider is whether similarly situated persons were treated in the same manner. The State has shown similar treatment of similarly situated individuals. The most similar situation to Kelley is Evarts, the other correctional officer that went to the

Dubuque residential facility on November 15 to assist Helm. That correctional officer also was disciplined for having unreported contact with a former offender, receiving a tattoo from Helm and for accessing the ICON system to review Helm's file. Similar to Kelley, the State terminated Evarts' employment. The State also provided other circumstances in which a correctional officer had an ongoing relationship with an offender without reporting it and another who used the ICON system for personal reasons. Those correctional officers were terminated.

Kelley provided examples of persons that received lesser discipline, but those persons were not similarly situated. One of the examples was an employee who was not a correctional officer, but was instead a Senior State Industries Technician with IPI at the ASP facility. It's unclear whether the job duties of that position required the same level of interaction with offenders as a correctional officer, and thus whether the relationship between an offender and an employee raise the same perils as between an offender and a correctional officer. The other example provided by Kelley involved a correctional officer that was accessing unauthorized, non-work related websites while at work. Neither example is similar to Kelley's situation.

Kelley also contends the examples of similarly situated individuals provided by the State actually are not similarly situated because those individuals do not have the same employment record as Kelley. Kelley's lengthy employment record and lack of substantial previous discipline may act as mitigating circumstances in this case. However, it does not negate the

similarity of the situation, especially between Kelley and Evarts. The two employees held the same position at the facility and were alleged to have violated the same rules for their relationship with former offender, Helm. Both were terminated. This demonstrates the State did not treat Kelley in a disparate manner.

Kelley and the State also dispute whether termination was a proportionate discipline for Kelley's actions and whether the State should have used progressive discipline.

Progressive discipline is a system where measures of increasing severity are applied to repeated offenses until the behavior is corrected or it becomes clear that it cannot be corrected. *Nimry and State of Iowa (Dep't of Nat. Res.)*, 08-MA-09, 08-MA-18, at App. 30. Progressive discipline is used to encourage employees to take corrective responsibility to follow work rules and employment obligations. *Stockbridge and State of Iowa (Dep't of Corrections)*, 06-MA-06 at 28. The purpose is to correct the unacceptable behavior of an employee and to convey the seriousness of the behavior while affording the employee an opportunity to improve. *Phillips and State of Iowa (Dep't of Human Servs.)*, 12-MA-05 at App. 16 (citing Norman Brand, *Discipline and Discharge in Arbitration* at 57 (BNA Books 1998)). When determining the appropriate discipline and use of progressive discipline, PERB considers the circumstances of the case. *Hoffmann and State of Iowa (Dep't of Transp.)*, 93-MA-21, at 26.

Progressive discipline may be inapplicable when the conduct underlying the discipline was a serious offense. See *Phillips and State of Iowa (Dep't of*

Human Servs.), 12-MA-05 at App. 1, 13, 16-18 (finding an employee's breach of confidentiality a serious offense and imposing a 10-day suspension when the employee knowingly disclosed the information and the employee's job description involved maintenance of confidential records). When determining the appropriate type of discipline given the circumstances, PERB examines the severity and extent of violations, the position of responsibility held by the employee, the employee's prior work record, and whether the employer has developed a lack of trust and confidence in the employee to allow the employee to continue in that position, taking into account the conduct at the basis of the disciplinary action. *Phillips and State of Iowa (Dep't of Corr.)*, 98 H.O. 09 at 15; *Estate of Salier and State of Iowa (Dep't of Corr.)*, 95-HO-05 at 17.

Kelley violated multiple rules and had several instances in which he violated the rules through the course of his ongoing relationship with former offender, Helm. Individually, the separate instances in which these violations arose were troubling. Although the violations all arose due to Kelley's relationship with Helm, Kelley's actions when he accessed the ICON system, when he failed to report his relationship with Helm, when he received a discounted tattoo from Helm, and when he went to speak with Helm's parole officer all were separately, severe violations that call into question his integrity as a correctional officer. As a correctional officer, Kelley is required to maintain a high level of integrity and ethics due to his position and interaction with the offenders residing in ASP. It is a basic training concept for correctional officers

that inappropriate relationships with offenders or former offenders compromise an officer's ability to perform his or her duties.

The State reached the conclusion that Kelley could no longer be effective in his job duties. The State determined it lacked the trust and confidence in Kelley's ability to perform his job duties because his inappropriate and nonprofessional relationship compromised his ethics and integrity. They reached this decision despite the fact that Kelley had worked for the State for almost twenty years and had limited discipline.

Kelley testified that he would not do this again. He testified he would remember to wear his "correctional officer hat" in his personal life. This statement is hard to believe when Kelley failed to acknowledge the larger issue that he not only engaged in actions that were violations of the rules, but his actions led to this serious breach of trust with his employer. Kelley stated he forgot to file the report about his ongoing contact with Helm, and he just was not thinking as a correctional officer when he accepted the discounted tattoo from a former offender. Kelley failed to acknowledge the bigger picture, the reason for the prohibition on this type of relationship with an offender. Kelley's actions breached his trust with his employer and compromised his ability to do his job. Kelley's failure to recognize that his personal life could compromise his ability to perform his job duties in his professional life is especially problematic considering his almost twenty-year tenure with the State. Through his relationship with Helm and multiple incidents that occurred because of that relationship, Kelley placed himself in a position where he was able to be used.

His actions affected not only his own position, but also the integrity of the ASP facility as personnel at another correctional facility witnessed Kelley being used by an offender for that offender's personal gain.

Progressive discipline would normally militate a lesser discipline, especially considering Kelley's lengthy tenure with the State. Nonetheless, the State has shown that Kelley's multiple serious violations led to a valid reason for the State to mistrust Kelley's ability to continue to perform his job duties as a correctional officer. Thus, progressive discipline is inapplicable in this situation. Further, by failing to be forthcoming and honest during the investigation, Kelley bolstered the State's argument that it does not trust and does not have confidence in Kelley's ability to perform his job duties and continue in his position.

The State has demonstrated just cause to terminate Kelley's employment. I consequently propose the following:

ORDER

Kelley's state employee merit appeal is DISMISSED.

The costs of reporting and of the agency-requested transcript in the amount of \$380.63 are assessed against the Appellant, Brian Kelley, pursuant to Iowa Code section 20.6(6) and PERB rule 621—11.9. A bill of costs will be issued to the Appellant in accordance with PERB subrule 621—11.9(3).

The proposed decision and order will become PERB's final agency action on the merits of Kelley'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 merits.

DATED at Des Moines, Iowa this 24th day of April, 2019.

/s/ Amber DeSmet

Administrative Law Judge

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