

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

TOD KIRCHNER, Appellant,)	CASE NO. 102196
)	
and)	PROPOSED DECISION AND ORDER
)	
STATE OF IOWA (IOWA DEPARTMENT OF HUMAN SERVICES-INDEPENDENCE MENTAL HEALTH INSTITUTE),)	
Appellee.)	

Appellant, Tod Kirchner, 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. Kirchner appeals the third-step response of the director of the Iowa Department of Administrative Services (DAS) denying his appeal of his termination.

Kirchner worked as a residential treatment worker for the Iowa Department of Human Services (DHS) at the Independence Mental Health Institute (IMHI). Kirchner alleges the State did not have just cause to terminate his employment on April 27, 2018. The State denies that Kirchner’s termination was not supported by just cause.

A closed evidentiary hearing was held on January 15, 2019. Robin White represented Kirchner. Alla Mintzer Zaprudsky and Henry Widen represented the State. The parties submitted post-hearing briefs on March 1, 2019. After considering the evidence and the arguments of the parties, I propose the following:

FINDINGS OF FACT

Tod Kirchner was a residential treatment worker (RTW) at IMHI. Prior to working at IMHI he had worked as an RTW at a facility in Mt. Pleasant for over eight years. When that facility was closed, Kirchner transferred to IMHI in 2015.

IMHI is a locked acute-care hospital for psychiatric patients. The hospital is comprised of three wings, the adult female unit, the adult male unit, and the adolescent unit, which consists of children ages seven to seventeen. The facility houses sixty patients. Those patients were likely non-voluntarily committed to the facility after going through a court hearing in which they were found to be a danger to themselves or to someone else. Several of the patients are volatile. Management claims it is a regular occurrence for staff members to be moved from ward to ward during a shift when a patient is not doing well with a staff member that day.

When Kirchner transferred to IMHI he went through an initial orientation. This orientation included Mandt training. The Mandt training teaches staff to build healthy relationships with patients, peers, and coworkers. The training allows staff to note when a crisis cycle starts and when interventions need to be taken that will help to deescalate a crisis. Mandt training focuses on both communication and on safety holds. IMHI places special emphasis on the therapeutic communication aspect of the Mandt training. The initial Mandt training is three days, with two days of discussion on therapeutic communication. The staff reviews this training annually.

Six months after his transfer to IMHI, management evaluated Kirchner's work performance. In the evaluation, management stated that Kirchner was calm in crisis situations and complied with unit safety policies. Management also stated that Kirchner treated patients with dignity and respect and ensured safety. Although in the evaluation management stated that Kirchner preferred to work in the adult units, the evaluation further added that Kirchner was a team player and accepting of any delegated duty. Kirchner met expectations overall in that evaluation.

In the summer of 2016, Kirchner had two separate incidents that led to management issuing him work directives on July 14, 2016. In the first incident, a patient raised their voice. Kirchner raised his voice in response. In the second incident, Kirchner's supervisor told him to go help with baths. Kirchner responded that he would when he had time. After Kirchner did follow the instructions to go help with the baths, management felt Kirchner acted frustrated and exhibited a bad attitude. Management stated that on both occasions Kirchner failed to use therapeutic communication, first with a patient, and then with his supervisor. Kirchner received coaching and counseling, as demonstrated by his evaluations, regarding therapeutic communication.

As a result of these incidents, Kirchner was issued the following work directives:

1. You must complete the verbal portion of Mandt again as scheduled by your supervisor. Once completed, you must use only the approved Mandt techniques when intervening with patients.

2. You must keep your voice tone, volume and non-verbals calm and within normal volume. You must remain composed when a patient is escalating.
3. Be careful of what words you say to the patients – be aware of how they will be perceived by patients.
4. **If you have concerns about an assignment given to you by a supervisor, you need to address them in a professional manner. You need to follow the assignment and address them at an appropriate time in an appropriate manner later.** If you feel you can't address the issue with that supervisor, you need to address them with another supervisor or the AON.
5. You need to be aware of how your non-verbals and behavior influence others and avoid creating staff or supervisor conflict over your frustration.
(emphasis added).

Kirchner completed additional Mandt training due to these work directives. These work directives remained in effect through the rest of Kirchner's tenure at IMHI.

Over the next year, Kirchner's supervising nurse, Debra Fenner, claimed that Kirchner engaged in other instances of non-therapeutic communication. However, the record does not reveal that Kirchner received discipline for these instances prior to 2018. In Kirchner's evaluation spanning from August 2015 through May 2017, Fenner stated that Kirchner did not meet expectations regarding the communication portion of the evaluation. In the evaluation, she stated that Kirchner was not consistently utilizing therapeutic communications with patients and still had difficulty even after revisiting the verbal part of Mandt. Overall, however, Kirchner met expectations on the evaluation. The evaluation noted that Kirchner needed to continue to follow the work directives issued in 2016.

In January 2018, Kirchner had another couple of incidents that led to discipline. On January 22, 2018, Kirchner was assigned to do rounds on the adult men's unit. Conducting rounds consists of checking the entire unit and all the patients. The staff person assigned to rounds locates each patient. This task necessarily requires the staff person to be present in the unit. However, Kirchner's supervisor could not find him on the unit despite his assigned task. After paging him, the supervisor found that Kirchner had been on another unit, and he had the rounds board with him for the adult men's unit. Management determined that Kirchner was not truthful when the supervisor paged him about his location. On January 25, 2018, management determined that Kirchner made a disrespectful remark about performing patient safety rounds.

Kirchner's conduct during these occasions led management to issue him a five-day suspension and final warning. Kirchner did not grieve this discipline. The disciplinary letter, dated February 1, 2018, stated that Kirchner left his assignment of patient safety rounds without permission and without notifying a nurse. It also stated Kirchner was unprofessional when performing his assignment of patient safety rounds.

Management found that Kirchner violated several rules in the DHS Employee Handbook and the Nursing Operations Manual. Management cited violations of D-1, 2 regarding poor work and accepting and completing assignments, D-1, 3 regarding attentiveness to responsibilities, D-1, 10 regarding false and misleading statements, and D-1, 1 regarding following

instructions of supervisors.¹ In the disciplinary letter, management cited to Chapter 6 of the nursing operations manual policies, specifically quoting the sentences discussing patient safety rounds.

The incident at issue in this appeal, which led to Kirchner's termination, took place on April 22, 2018. That weekend, Sherry Streif was the nurse supervisor who monitored the entire hospital. Kirchner was assigned to work on Ward S, the adult women's unit, which normally has fifteen patients. Kirchner was assigned to rounds that day where he needed to check all the patients in the unit.

One of the patients in the unit, Patient RN, began yelling at Kirchner in Spanish. Kirchner did not know what she was saying, but knew she was upset. Ladonna Taylor, the registered nurse on duty in the ward, asked Kirchner to stay in the back of the ward and away from this patient as she was having a delusion that Kirchner had raped her. Patient RN had made similar claims about other male staff persons. Because Kirchner was doing rounds he had to transfer that task to someone else while he stayed in the back.

Taylor had Kirchner stay away from this patient to determine whether Kirchner was a trigger for this patient's delusion and whether this patient could calm down. Taylor talked to Streif about this particular patient and told Streif that Patient RN was having delusions and was having a hard time that day. Streif and Taylor discussed whether Kirchner needed to be reassigned.

¹ Based on the employee handbook in the record, management appears to have incorrectly cited the rules in this letter. The citations should have been to part B of the handbook rather than part D.

However, they decided to wait a little longer to determine whether Patient RN could move past the delusion. Streif determined that if the patient could not move past the delusion then Kirchner would have to be moved so the patient could feel safe since Kirchner's presence was triggering the delusion.

Kirchner came out later and was standing by Taylor when Patient RN came after him, yelling at him, and chasing him. Kirchner got caught between two chairs and then by another residential treatment worker. Patient RN struck Kirchner on the back of his head and scratched his back. Kirchner got away from her to the other side of the table. Charge nurse Taylor, and residential treatment workers Evan Cahill and Keith Nuehring were in the room during this altercation.

After this encounter, Taylor called Streif and told her that Patient RN was not coming out of the delusion. Taylor explained to Streif that Patient RN had been yelling and swearing at Kirchner and had tried to hit him. Streif decided to move Kirchner off the unit and move a different RTW, Alyssa Burco, on to the unit. Streif talked to the other registered nurses working on the other wards and asked that Burco be sent to the women's unit. Streif told Taylor to send Kirchner to Ward T, the adolescents' unit.

When Taylor came out of the front office after calling Streif, she told Kirchner he was going to be removed from the ward. Another RTW, Evan Cahill, was standing there during this conversation. Kirchner told Taylor the patient would calm down and this had happened before. Taylor claimed that Kirchner said "I'm not going up there" when told of his reassignment. Kirchner

claimed he never told Taylor that he would not go to the other ward, but admitted during his investigatory interview that he told Taylor he did not want to go. Finally, Taylor told Kirchner that he could call and talk to Streif about the reassignment.

Kirchner went to the front office of the ward and called Streif about this assignment change. The front office of the ward is comprised of windows and is not soundproof. If a patient is nearby, the patient would be able to overhear someone speaking. During the phone call, Kirchner told Streif that he did not want to leave the women's ward because he thought he could maintain safety as the patient at issue was having problems with other staff as well. When Kirchner called Streif he was very upset and Streif claimed he was very angry and argumentative. Streif contended Kirchner said "I'm not going to Ward T. I don't have to." In his interview, Kirchner claimed he said "I don't want to go." Taylor also corroborated that Kirchner was angry and argued with Streif although she was not in the room during the phone call.

As Kirchner was not calming down during the phone call, Streif told him that she was done talking on the phone and would come to talk to him in person. Kirchner said, "I'm done too." Kirchner admitted in testimony that he was not in his right state of mind at this point because he had just had an altercation with a patient. He also claimed in testimony that during that altercation, another RTW tied him up in a manhold when he was trying to get away from the patient. Kirchner did not tell his supervisors that he was assaulted by Patient RN during the incident. He also failed to report that he

was placed in a manhold. He claimed he did not get the chance to report it that day and he was placed on administrative leave upon arriving the next day so he did not have the opportunity to report the assault.

Burco, the RTW sent to replace Kirchner, arrived to the ward prior to Streif. After Streif arrived, Streif and Kirchner had a conversation in the back office, which is more private. Streif told Kirchner that it was not safe or fair to Patient RN to keep Kirchner there as the patient could not get past the delusion that Kirchner had raped her. Kirchner kept saying that he could stay because this situation had happened before. Streif again told Kirchner the patient was not calming down and it was not fair to the patient to have her feel unsafe. After Kirchner was calmer, he asked Streif whether he was in trouble. She told him that he was in trouble as he had called and yelled at her and said he was not going to the other unit, which is insubordination. Streif then asked Kirchner if he was accepting his assignment to go to the adolescents' ward and he said that he was accepting the assignment.

Another patient had heard that Kirchner was being moved to another ward and was upset. The patient tried to push in the office and kept saying she did not want Kirchner to leave. Streif testified that Kirchner told the patient, "Mrs. Streif is making me go to another unit." Kirchner claimed he said "I am going to another ward." The patient tried to get to Streif. Streif stayed away from the patient while the other staff calmed the patient down.

Kirchner was placed on administrative leave on April 23, 2018. The facility began an investigation with Georgeanne Cassidy Westcott (Westcott),

the administrator of nursing, Debra Fenner, who was Kirchner's nursing supervisor, and Carol Adams, the personnel officer taking a role in the investigation. Westcott was involved in the investigation because it was deemed to be a serious investigation due to Kirchner's previous discipline.

The record demonstrates the investigation consisted of interviews of two people, Taylor and Kirchner. Additionally, both Streif and Taylor provided statements for the investigation. It's unclear whether Taylor was interviewed once or twice and whether Streif was interviewed at all. During the investigation, Westcott also reviewed Kirchner's past disciplines, past evaluations, and past work directives.

During his investigatory interview Kirchner admitted that he was frustrated, and he raised his voice to Streif. He also admitted to violating his work directives and that he did not accept his work assignment properly. Kirchner denied that he violated the safety and well-being of the patients. In testimony, however, Kirchner said he does not agree that he violated his work directives and when he stated that he did not accept his assignment properly, he just meant that he was upset because he had just been attacked by a patient.

Westcott, in conjunction with the superintendent, determined to terminate Kirchner. They made this decision after determining Kirchner violated a rule similar to that listed in the five-day and final warning that had been issued two months earlier, he violated his work directives, and he had multiple opportunities to change his behavior while he worked at IMHI, but

had repeatedly failed to engage in therapeutic communications. After conducting a Loudermill interview on April 27, 2018, Westcott and Adams provided Kirchner with the termination letter.²

The termination letter stated Kirchner was being terminated because of the events that transpired on April 22, 2018, and then described the events with some detail. The letter specifically stated that Kirchner was so upset with a supervisor that he raised his voice to argue with her and would not accept the direction of the nurse and the supervisor about an assignment. The rules at issue, as listed in the termination letter, were as follows:

Part B

Employee Responsibilities and Work Rules

Section B-1. General Standards of Conduct and Work Rules

The following general standards of conduct and work rules are intended to illustrate minimum expectations for acceptable work performance and workplace behavior. They are not all-inclusive. Misconduct not specifically described will be handled as warranted by the circumstances of the case involved. Violation of a work rule may result in discipline up to and including discharge, and in some cases may result in legal action.

1. An employee's job is important, and employees are expected to cooperate and follow the instructions of supervisors or other designated members of management. Insubordination (intentional refusal to follow an authorized supervisor's reasonable orders or instructions) is prohibited unless such instructions are contrary to the Code of Iowa.
2. Poor work is not acceptable. Employees are expected to perform their work properly and efficiently and to meet performance

² Westcott and Adams accidentally gave Kirchner a draft copy of the termination letter at first. They later called Kirchner back and provide him with the final copy. The changes in the two documents are minor.

standards. Employees are expected to seek, accept and accurately complete assignments within deadlines and not neglect job duties and responsibilities.

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.

The termination letter also cited the following policy provisions of chapter six of the Nursing Operations Manual:

Unit Safety/Security

1. Nursing staff will maintain a safe therapeutic environment.

2. Nursing staff will utilize assessment skills, therapeutic communication and timely interventions to maintain safety.

The termination letter stated that Kirchner violated his work directives.

The letter concluded that due to the seriousness and the continuation of Kirchner's violations, and Kirchner's failure to respond and improve after the work directives, the State made the decision to terminate his employment.

Kirchner signed a state employee grievance form on April 30, 2018, claiming he was terminated without just cause and requesting to be made whole. Following the third-step grievance, the DAS director's designee denied Kirchner's grievance on May 30, 2018, concluding that termination was warranted and supported by just cause.

Kirchner filed the present appeal June 5, 2018.

CONCLUSIONS OF LAW

Kirchner 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 (internal 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.

Kirchner violated DHS rules and his work directives. Taylor told Kirchner that he was reassigned, and he immediately questioned the assignment. He then called Streif and she told him why he was being reassigned and he continued to question the assignment. Rather than following the instructions given to him by the charge nurse and the nursing supervisor, Kirchner maintained that he did not need to leave the ward. He failed to accept a work assignment. Further, he was insubordinate by failing to follow a work assignment and raising his voice to his supervisor. Additionally, Kirchner failed to maintain appropriate control during the situation and was argumentative with a supervisor. Although Kirchner had been attacked by a patient, at no time did he tell Taylor or Streif he needed a minute to collect himself or take the cooling off time he might need. Instead he raised his voice in frustration at Streif while on the phone with her in the front office. As the front office is not soundproof and Kirchner's voice was raised, his conduct could have led to an unsafe environment for any patients that may have overheard his conversation. Kirchner did not utilize therapeutic communication with the nurse supervisor and instead argued with her.

The day after the event, Kirchner admitted to raising his voice and failing to follow his work directives. Kirchner now maintains he did not violate work directives. Even in his testimony, however, Kirchner admits he did not go to the adolescent ward when instructed and he told both Taylor and Streif he did not want to go to the other ward although Streif maintained that Kirchner said he would not go to the other ward. Regardless of his chosen language, Kirchner

did not go to the adolescent ward when instructed and argued with the supervisor about the assignment. His conduct was a violation of the DHS Employee Handbook, the Nursing Manual, and his work directives as cited in the termination letter.

IMHI adequately apprised Kirchner of the reasons for its termination of his employment through the termination letter. The letter provided the rules violated, the date of the incident, and the conduct that led to the discipline.

Kirchner also knew that his behavior could lead to discipline. Kirchner received a copy of the DHS Employee Handbook and acknowledged that he had received and read it. The record is unclear whether Kirchner received a copy of the nursing operation manual that was cited in the termination letter, but he was aware that he was required to engage in therapeutic communication. Kirchner had received at least some coaching and counseling and individualized training regarding therapeutic interventions and communication.

Kirchner also knew the behavior that was expected of him because of his previous conduct and the work directives and discipline that had resulted from his past behavior. IMHI management issued work directives to Kirchner in July 2016 about his use of therapeutic communications and the appropriate way to address problems he might have with his work assignments. The work directives also required Kirchner to review training on therapeutic communication. Kirchner received discipline in February 2018 regarding his failure to follow a work assignment. That disciplinary letter cited two of the

same provisions that were cited in the termination letter. Those provisions stated that employees need to follow the instructions of management and employees are expected to accept and complete work assignments. Kirchner knew or should have known the conduct that was expected of him. Additionally, Kirchner demonstrated that he did know the conduct that was expected of him when he asked on April 22 at the end of his conversation with Streif whether he was in trouble. Kirchner was aware that his conduct may lead to discipline.

The rules cited and imposed upon Kirchner by IMHI regarding acceptance of work assignments and therapeutic communications are reasonable for the facility's purpose. The facility enforces rules regarding work assignments and therapeutic communication to maintain the safety of patients and the staff in a volatile work environment. Kirchner claims the rules were not reasonable as Kirchner's work directives stated he could express concerns about an assignment. However, the work directive also stated Kirchner needed to "follow the assignment and address [the concern] at the appropriate time in an appropriate manner **later.**" (emphasis added). The work directive did not give Kirchner the option of discussing the assignment prior to following the work assignment. It allowed Kirchner to follow up with a supervisor at a later time after he had followed the assignment. The work directive clearly required Kirchner to immediately follow his work assignments.

Kirchner contends that termination was not the appropriate discipline given the circumstances of the case. Kirchner claims the State did not follow

progressive discipline because the conduct cited in the previous discipline was not similar to the conduct at issue in the current discipline, and Kirchner also claims the discipline was not proportionate to the offense.

Progressive discipline is a system where measures of increasing severity are applied to repeated offenses until the behavior is corrected or it is clear the behavior cannot be corrected. *Nimry and State of Iowa (Dep't of Nat. Res.)*, 08-MA-09, 08-MA-18 at App. 30. The purpose is to convey the seriousness of the behavior while affording an employee the opportunity to improve and take corrective responsibility. *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)); *Stockbridge and State of Iowa (Dep't of Corrections)*, 06-MA-06 at 28.

In this instance, the State followed progressive discipline. In 2016, Kirchner was provided with work directives, which instructed him on therapeutic communications and completing work assignments. In February 2018, Kirchner was disciplined for conduct which occurred in January 2018. That conduct involved following work assignments. Specifically, Kirchner received a five-day suspension and final warning regarding work assignments and truthfulness. The State claimed Kirchner was assigned to complete rounds but was not on the ward doing rounds as assigned and then lied about where he was when he was asked. In the discipline letter, the State cited two of the same rules cited in the termination letter regarding the need to follow instructions of management and accepting and completing work assignments.

In the termination letter the State claims Kirchner failed to accept a work assignment and was insubordinate when he refused the work assignment. Although the January incidents and the April incident do not have the exact same facts and involve violations of other work rules in addition to the rules on following work assignments, they are regarding the same issue of accepting and completing work assignments. Kirchner is not accepting and completing his work assignments as ordered by the nurse and the nurse supervisors. Whether Kirchner failed to complete the work assignment as in the case that led to his five-day suspension, or failed to accept the work assignment as in the case that led to the State's decision to terminate Kirchner, on both occasions, Kirchner failed to follow work assignments.

The discipline of termination follows directly from the five-day suspension and final warning that Kirchner received two months prior to his termination. Kirchner did not grieve that five-day suspension and final warning. He claims he ran out of time to grieve that discipline. As the deadline has passed and the discipline stands, Kirchner cannot revive that challenge in this case. *See Alleman and State (Dep't of Revenue and Finance), 97-MA-07 at 12* (finding Alleman could not revive unsuccessful challenges to previous disciplines he believed to be unreasonable and arbitrary when the challenges to those disciplines were unsuccessful and finalized). Kirchner was given the opportunity to correct his behavior by carrying out his directed work assignments. By questioning the work assignment given to him despite the

previous work directives and five-day suspension, Kirchner has not displayed that he will improve and take corrective responsibility.

Kirchner also contends that termination is not proportionate for his offense. If this had been the first time Kirchner had failed to accept and complete a work assignment as directed, then termination would be too severe a penalty. However, Kirchner had previously received work directives for this behavior of failing to follow work assignments and not engaging in therapeutic communication. He also received a five-day suspension for failure to complete a work assignment as directed. Kirchner has demonstrated a pattern of failure to follow work assignments as directed by the nursing staff and supervisors. *See id.* at 11–12 (finding termination not too severe a penalty when employee was progressively disciplined for insubordination on three prior occasions). Terminating Kirchner’s employment for his failure to accept and complete a work assignment as directed in addition to his insubordination in failing to accept the assignment and raising his voice to his supervisor, and his failure to use therapeutic communication is not disproportionate given the totality of the circumstances.

Kirchner’s past employment record does not alleviate the concerns at issue due to his conduct. Kirchner has worked for the State for over 10 years, most of that time at the facility in Mt. Pleasant. Since being transferred to the Independence facility in 2015, Kirchner has had some work place conduct issues. Kirchner’s first evaluation reveals he had gone through the initial training and was doing well. But in 2016 he received work directives about

therapeutic communications and following his work assignments. Further, Kirchner's evaluation, completed in 2017 and covering a period of almost two years from 2015 through 2017 found that Kirchner did not meet expectations in his demonstration of technical and professional knowledge due to his inconsistent use of therapeutic communications with patients. That evaluation stated he needed to continue to follow the work directives. Kirchner's record was given weight in the final decision by management to terminate his employment.

A main issue of contention between the parties is the State's investigation of Kirchner's conduct. Kirchner argues the investigation was not sufficient or fair as the investigation did not include the statements from the other staff members on the ward about what happened leading up to Kirchner's conversation about his assignment with Taylor and Streif. The State argues it conducted a full and fair investigation into Kirchner's conduct.

The record of the State's investigation is not a model of thoroughness or clarity. Based on the record in front of me, the State interviewed Kirchner, Taylor, who was the nurse on staff in the ward, and received statements from Taylor and Streif, who was the nurse supervisor on the night of the incident. The record does not contain evidence that other persons were interviewed or other statements were taken.

Both parties claim the investigation included an interview or statement from Burco, the RTW that came to relieve Kirchner, however, the record contains no such documentation. In testimony, Westcott, the administrator of

nursing and the lead investigator, stated she reviewed the statements of the three persons involved in the incident. She soon thereafter says the focus of the incident was Kirchner's behavior with the nurse and the supervisor, so there were three people involved. Westcott never named which three persons she meant when she said she reviewed the statements of the three persons involved. I cannot find evidence in the record to support a finding that Burco was interviewed or that management took statements or interviewed anyone else that was working on April 22, 2018.

There were other RTWs working on the ward that day yet the record does not reflect that any of those RTWs were interviewed. During the investigation, management asked questions about where Kirchner was when he was speaking on the phone to Streif and whether patients overheard him. Yet, management never followed up with the other RTWs to see if anyone, including patients, could actually hear Kirchner when he was speaking to Streif on the phone in the front office. Management had conflicting accounts from the two people interviewed in the investigation. Taylor said she could hear Kirchner when he was on the phone and that he looked angry. Kirchner said that he was not speaking that loudly, although his voice was raised and he was frustrated. Presumably the other RTWs could have provided further insight. Yet, the record is devoid of those statements. It is unclear whether management failed to take the statements or whether it was not included in the record.

Management insinuates that Kirchner's agitation and conduct while speaking to Taylor and Streif may have led another patient to become upset

because he was being moved to a different ward. Streif testified as such, but her claim that Kirchner told the second patient that Streif was making him go to the other ward never appears in the investigation as contained in the record. Additionally, the record does not show whether the other employees on the ward were asked about any of the patients' reactions. Management could have verified the events of the day with any of the other staff, and yet the State has not demonstrated that management conducted any other interviews of the staff or received statements from any of the other staff members.

The evidence in the record does not show Kirchner's behavior affected the safety and well-being of patients. Management asked Kirchner during his interview whether he felt that he violated the safety and well-being of the patients, but he said no. The record does not reveal what actually happened to the patients as a result of Kirchner's behavior during his conversations with Taylor and Streif. One patient was agitated about Kirchner's reassignment, but it is unclear how she knew of it. The evidence does not show management knew of the effect that Kirchner's behavior had on the patients at the time of the investigation. The record of the investigation is devoid of evidence that Kirchner's conduct led to unsafe conditions for the patients.

Nonetheless, Kirchner admitted in his investigatory interview to raising his voice to his supervisors, refusing to accept the work assignment properly, and violating his work directives. Kirchner now claims he did not refuse the work assignment and did not violate his work directives. The investigation does show that he violated his work directives by failing to go to the other ward

when instructed by Taylor and again by Streif. Further, even accepting that Kirchner raised his voice and was frustrated, but not speaking angrily, he was not speaking to his supervisors in a therapeutic manner and he acted insubordinately by his failure to properly accept his work assignment and his tone and manner of speaking to his supervisors. Despite the deficiencies in the investigation, the investigation demonstrated that Kirchner violated the DHS Employee Handbook, the nursing manual, and Kirchner's work directives.

Kirchner argues that had a full investigation been done, management would have obtained a fuller picture of the events that took place that day. Kirchner claims those events would demonstrate mitigating circumstances exist, which warrant a lesser discipline or no discipline. Kirchner claims the mitigating facts include the physical injury he received from the patient and the hold that a fellow RTW placed him in when he was trying to escape from Patient RN's attack. Kirchner alleges these incidents should have led to a post-event debriefing, which was not done.

At the time of the Loudermill interview, Kirchner stated that Patient RN actually did scratch him and left a cut. Now, Kirchner argues that a post-event analysis should have been done where he would have been debriefed due to the interaction between himself and the patient that scratched him. The evidence cited by Kirchner is a manual about patient seclusion and restraint. There is no evidence in the record that a patient was secluded or restrained. Thus, a post-event briefing was not required. Kirchner also contends that at one point he was placed in a hold by a fellow RTW. However, even in the statements

Kirchner obtained from other RTWs, no one corroborated this fact. Moreover, putting a staff member in a hold does not require a post-event debriefing under the nursing manual.

Kirchner maintains that he was naturally upset after this incident with the patient in which he was scratched. He asserts the event itself should be construed as a mitigating circumstance and one that was possibly not considered by management because of the incomplete investigation. Regardless of the lack of thoroughness of the investigation, management knew at the time of making its decision to terminate Kirchner that his behavior occurred after a physical attack. Management may not have acknowledged Kirchner received an injury, but management knew that one of the patients physically tried to attack Kirchner. Despite that, management chose to terminate his employment.

The incident with Patient RN does not negate Kirchner's obligation to follow the DHS Employee Handbook, the nursing manual, and his work directives. The patients at the IMHI are volatile. Because of that, IMHI requires staff training on therapeutic communications to deescalate a crisis situation. This training requires staff to remain calm amid the crisis. Kirchner was not able to utilize that training in this situation. Kirchner admitted that he raised his voice to his supervisor. Kirchner questioned the work assignment with Taylor and again with Streif. Kirchner's work directives required him to accept the assignment and if he would like to discuss it, he could do so later. Instead, Kirchner failed to accept his work assignment upon the direction of the nurse and the supervising nurse until both discussed it with him.

Kirchner's previous discipline included a five-day suspension and final warning for failing to follow work assignments. Although management has not shown that Kirchner's actions on April 22 actually resulted in diminished safety and well-being of the patients, his continued failure to follow work assignments in combination with his insubordination and failure to institute therapeutic communication provide the grounds for just cause to terminate his employment.

Despite the State's investigation, the State has proven just cause to terminate Kirchner's employment under the totality of the circumstances. I consequently propose the following:

ORDER

Kirchner's state employee merit appeal is DISMISSED.

The costs of reporting and of the agency-requested transcript in the amount of \$643.90 are assessed against the Appellant, Tod Kirchner, 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 Kirchner'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 7th day of June, 2019.

/s/ Amber DeSmet

Administrative Law Judge

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Parties served via eFlex.