

FINDINGS OF FACT

GRC is a residential intermediate care facility for individuals with intellectual disabilities. It provides 24/7 care and supervision for residents as required by the residents' specific medical needs and diagnoses. The facility has 16 homes which house approximately 200 residents. Smith began her employment with GRC in July 1999 and was promoted to the position of Resident Treatment Supervisor (RTS) in 2005.

GRC has three shifts – AM, PM, and night watch (NW). Smith is an RTS on the NW shift. The NW shift has about 80 employees assigned throughout the facility's 16 homes. The first task an RTS has upon arriving to work is setting the shift to assure GRC maintains adequate staffing at each of the homes. This task may require reassigning direct care staff from one home to another, or mandating staff from a prior shift to work longer to maintain required staff-to-resident ratios in each home.

The NW shift begins at 10:15 p.m. All hourly employees are expected to report to work by 10:15 p.m. However, NW shift supervisors, who are salaried employees, were directed and expected to report to work by 9:30 p.m., forty-five minutes before the NW shift start time. This earlier start time was implemented to provide shift supervisors with adequate time to set the staffing assignments before

the shift change at 10:15 p.m. The record demonstrates Smith was aware her expected start time as a shift supervisor was 9:30 p.m.¹

Although DHS has attendance and punctuality expectations for all employees, the attendance policy governing non-supervisory direct care staff is different from the policy that governs attendance expectations for supervisory staff such as Smith.² As an RTS, Smith's duties included tracking attendance for employees under her supervision consistent with the attendance policy applicable to non-supervisory direct care staff. As a supervisor, however, Smith was not subject to the same policy. Instead, supervisory staff is subject to the attendance and punctuality expectations as articulated in the DHS Employee Handbook, Part D., Employee Responsibilities and Work Rules. The applicable work rule states:

Section D-2. Attendance and Punctuality

Each employee is expected to be on the job, on time, each scheduled workday and observe the time limits for meals and breaks. Each work unit has specific procedures for calling in when an employee is going to be absent. The employee is responsible for notifying the supervisor and requesting approval for an absence in accordance with the procedures for the employee's work unit or as directed by the supervisor. Excessive absenteeism and/or tardiness will not be tolerated. A continuing record of unsatisfactory attendance or lack of punctuality may result in discipline up to and including discharge. If an employee is absent for three consecutive working days without proper notification or authorization, the employee may be considered to have voluntarily terminated employment.

¹ In grieving a one-day suspension she received in November 2017, Smith asserted she was incorrectly denied leave under the Family Medical Leave Act (FMLA) for not having worked enough hours during the qualifying year. Smith's appeal identified the NW shift starts at 10:15 p.m., but acknowledged she is required to report to work 45 minutes before the shift starts. Smith claimed the "hours worked" should also count those 45 minutes she is required to work.

² The attendance policy applicable to non-supervisory direct care staff is a "no-fault" policy that counts "occurrences" of tardy arrivals and unscheduled absences on two separate tracks. The occurrences are tracked on a 12-month rolling period. If an employee accrues more than five occurrences on either track, GRC starts discipline with a written reprimand and issues progressively more severe discipline if the employee continues to accrue occurrences on a rolling 12-month period.

Pursuant to this work rule, “excessive” attendance and punctuality issues would subject an employee to disciplinary action. The record shows that all supervisory employees with attendance problems are disciplined under work rule D-2. Like in Smith’s situation, other supervisory employees who failed to follow the call-in procedure or had unscheduled absences were disciplined in a progressive manner.

GRC’s call-in procedure dictates that an employee must notify the facility at least sixty minutes prior to the shift start time if the employee is unable to report to work for a scheduled shift. The NW shift runs on a “skeleton crew” with at most two RTS’s to set the staffing assignments before the PM shift is relieved at 10:15 p.m. Thus, obedience to the call-in procedure on the NW shift is critical because it provides the facility with adequate time to contact another supervisor for back-up or inform the other RTS on duty to set the shift for the entire facility.

As previously noted, the NW shift starts at 10:15 p.m., but NW RTS’s were expected to report to work by 9:30 p.m. The evidence presented demonstrates the call-in procedure thus requires the NW RTS’s to notify the facility of late arrivals or absences by at least 8:30 p.m. However, the record is ambiguous whether Smith understood that the call-in procedure required her to notify the facility an hour before she was expected to report to work at 9:30 p.m., or an hour before the start of the NW shift at 10:15 p.m. Although GRC has shown the call-in procedure was reviewed and discussed with Smith on December 22, 2017, it remains unclear on this record if Smith was given a specific time for notifying the facility under the call-in procedure.

The record demonstrates Smith's attendance and punctuality have been a concern for GRC since 2015. Smith's February 2015 to February 2016 annual performance evaluation, as provided to her on February 18, 2016, indicates that she was given a work directive to improve her attendance and a list of unapproved absences she accumulated during that rating period. The evaluation also noted that Smith greatly improved her attendance after receiving the work directive. Smith's February 2016 to February 2017 performance evaluation, as provided to her on February 27, 2017, noted that she did not follow the attendance policy on one occasion during that rating period when she failed to report to work as scheduled. Smith's February 2017 to February 2018 performance evaluation listed the attendance-related disciplines she received during the applicable rating period. However, GRC provided Smith this evaluation on February 18, 2018, the same day it issued the three-day suspension that is the subject of the present appeal.

GRC provided Smith with a "job performance review guide" on June 12, 2017. Such reviews are given to employees with an ongoing job-related concern. The goal of the review is to highlight for the employee the issues that exist and how they can be fixed. Among other goals and objectives, this written review reminded Smith that attendance and punctuality are imperative to her job. She was notified about the number of unscheduled absences she had at the time. Smith was given another performance review regarding her attendance on August 31, 2017.

Prior to the three-day suspension at issue here, Smith was disciplined with a written reprimand and a one-day suspension for violations of the same work rule,

section D-2, Attendance and Punctuality, of the DHS employee handbook.³ Smith received a written reprimand on June 22, 2017, after she had accumulated eight unscheduled absences between August 29, 2016, and June 3, 2017. During the investigation of those incidents, she acknowledged awareness and understanding of the section D-2 attendance and punctuality work rule. Smith subsequently received a one-day suspension on October 27, 2017, after failing to report to work as scheduled on September 27 through October 2, 2017.⁴ The record demonstrates that all timely appeals of the written reprimand and the one-day suspension have been exhausted and the disciplines are final.

On February 18, 2018, GRC disciplined Smith with a three-day suspension for failure to follow the call-in procedure on January 27, 2018, and for an unscheduled absence on February 2, 2018. This three-day suspension is the subject of the present appeal.

Smith was scheduled to work on January 27. At 9:53 p.m. that night, Amanda Reed, the night watch administrator and Smith's supervisor, received a text message from the administrator-on-duty (AOD) that Smith failed to report to work and failed to call the facility regarding the absence. As Reed was on her way to the facility, she received another text message from the AOD that Smith called and reported she was on her way to work. Smith arrived at 10:35 p.m. During the

³ For the one-day suspension, although the cited work rule is B-2, this is only due to a renumbering of the DHS handbook that occurred at the time. The language of work rule D-2 as cited in the written reprimand and the three-day suspension is the same as the cited B-2 language in the one-day suspension.

⁴ Smith sought to have these absences designated as FMLA leave but was ultimately deemed ineligible for FMLA by the State's FMLA administrator for not having worked enough hours during the qualifying year.

investigatory interview regarding this incident, Smith reported that her alarm did not go off and that she called the AOD well after 9:15 p.m. Smith acknowledged she had been trained on and understood the call-in procedure, but the investigatory interview does not demonstrate that Smith specifically understood she was required to call an hour before her 9:30 p.m. start time.

Smith was scheduled to work on February 2, 2018, but did not report to work that day. During the investigatory interview regarding this incident, Smith acknowledged she did not report to work as scheduled. She indicated that she was in a car accident and went to the emergency room but was not admitted. Smith did not provide any documentation to show a visit to the hospital. Smith asserted this absence should be designated as FMLA leave but that GRC's failure to report what she considered her accurate number of hours worked resulted in the State's FMLA administrator determining she was ineligible for FMLA coverage. Although Smith sought to appeal that determination, it was not changed and Smith remained ineligible for FMLA coverage.

Following the investigation, GRC concluded Smith's actions violated the DHS work rule regarding attendance and punctuality. On February 18, 2018, Smith was provided with a notice of suspension, which stated in pertinent part:

We have concluded our investigation into your work responsibilities related to employee attendance. Our investigation verified that you failed to follow the Call In Procedure violations (sic) on 1/27/2018 and you were absent from work on 2/2/2018. As a result of your failure to comply with the Work Directives & DHS Work Rules, you will receive a 3-day paper suspension. While this action does not reduce your pay, seniority, or other benefits, it does carry the same weight as if you had been subject to a 3-day suspension.

The notice of suspension also included the language of DHS work rule D-2, Attendance and Punctuality, as previously quoted above.

Smith appealed the three-day suspension to the director of the Department of Administrative Services (DAS) claiming the discipline is not supported by just cause. DAS denied the grievance on July 6, 2018, concluding the discipline imposed is supported by just cause.

Smith filed the present appeal with PERB on August 6, 2018.

CONCLUSIONS OF LAW

Smith filed the instant state employee disciplinary action 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.

The following DAS rule sets forth specific discipline measures and procedures for disciplining employees.

11—60.2(8A) Disciplinary actions. Except as otherwise provided, in addition to less severe progressive discipline measures, any employee is subject to any of the following disciplinary actions when 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 or the agency of employment, conviction of a crime involving moral turpitude, conduct unbecoming a public employee, misconduct, or any other just cause.

The State bears the burden of establishing that just cause supports the discipline imposed. *E.g., Phillips and State of Iowa (Dep't of Human Res.)*, 12-MA-05 at App. 11. The term "just cause" as employed in subsection 8A.415(2) and DAS administrative rule 11—60.2 is not defined by statute or rule. *Stockbridge and State of Iowa (Dep't of Corr.)*, 06-MA-06 at 21 (internal citations omitted). Whether an employer has just cause to discipline an employee is made on a case-by-case basis. *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. As previously stated by the Board,

. . . a [§ 8A.415(2)] 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. The Board has further instructed that an analysis of the following factors may be relevant:

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. PERB also considers how other similarly situated employees have been treated. *E.g. Kuhn and State of Iowa (Comm'n of Veterans Affairs)*, 04-MA-04 at 42.

The presence or absence of just cause rests on the reasons stated in the disciplinary letter provided to the employee. *Eaves and State of Iowa (Dep't of Corr.)*, 03-MA-04 at 14. To establish just cause, the State must demonstrate the employee is guilty of violating the work rule, policy, or agreement cited in the disciplinary letter. *Gleiser and State of Iowa (Dep't of Transp.)*, 09-MA-01 at 17-18, 21. Smith's notice of suspension indicates she was disciplined for violating the DHS work rule on attendance and punctuality when she failed to follow GRC's call-in procedure on January 27, 2018, and failed to report to work as scheduled on February 2, 2018.

Smith alleges she lacked notice or forewarning regarding the employer's applicable attendance and punctuality expectations. She argues she lacked knowledge concerning what attendance policy applied to her, the specific time she was expected to call the facility under the call-in procedure, and that GRC failed to provide notice her attendance was a problem prior to issuing the three-day

suspension. Under the record presented, Smith's arguments regarding notice are unavailing.

The State has presented sufficient evidence that supervisors, such as Smith, are subject to the attendance and punctuality expectations as articulated in DHS work rule D-2. Smith was aware of the applicable policy prior to the three-day suspension because she had been disciplined with a written reprimand and a one-day suspension under the same attendance policy.

The record similarly establishes that Smith was aware of the applicable call-in procedure. During the investigation, Smith acknowledged she had been trained on and understood the call-in expectations. Even accepting Smith's assertion that she understood the procedure required her to call an hour before the shift start time at 10:15 p.m., not her expected start time at 9:30 p.m., she failed to follow either one of those expectations because she called the AOD well after 9:15 p.m.

The evidence presented demonstrates Smith was made aware her attendance was an issue on numerous occasions prior to the three-day suspension. She was informed her attendance was a problem through her employee performance evaluations, performance review guides, and prior disciplines that were issued for the same type of attendance and punctuality concerns. These prior notices, both disciplinary and non-disciplinary, provided Smith with adequate notice of the applicable attendance expectations and that she was not meeting those expectations.

Smith also claims the State has not presented sufficient proof she violated the attendance policy or call-in procedure as alleged. For the January 27 incident,

Smith presented the PM and NW schedules to argue the documentation only shows she arrived to work late at 10:35 p.m., but it does not show she failed to follow the call-in procedure. As previously noted, a dispute exists whether Smith understood the procedure required her to call an hour before her start time at 9:30 p.m., or an hour before the NW shift start time at 10:15 p.m. This dispute does not need to be resolved. Smith admitted during the investigatory interview that she contacted the AOD well after 9:15 p.m., which failed to provide the facility with the required notice under either interpretation of the call-in requirement.

In regard to the unscheduled absence on February 2, Smith does not dispute she failed to report to work as scheduled. Instead, Smith claims the absence was due to a car accident and it should have been designated as FMLA leave had GRC correctly reported her total hours worked to the State's FMLA administrator. The record shows Smith contested this determination but that her FMLA ineligibility was unchanged. Thus, for the purpose of determining sufficient proof of the alleged violation in this proceeding, the record demonstrates Smith had an unscheduled absence on February 2.

Smith asserts several arguments regarding the appropriateness of the three-day suspension as imposed in this case. She appears to claim the attendance work rule applicable to RTS's is unreasonable and that GRC should consider her attendance issues on separate disciplinary tracks, just like it does for non-supervisory direct staff whose unscheduled absences and tardy arrivals are counted on separate tracks. Had GRC tracked her attendance on separate tracks,

Smith argues she would not have received a three-day suspension but a lower level of discipline.

Under the record presented, the State has established that having different attendance expectations for supervisors compared to direct care staff is reasonable. Supervisors have different duties and a higher level of responsibility in terms of assuring adequate staffing levels during each shift. While having a direct care employee late to work is certainly a concern, a supervisor who fails to report to work as scheduled is more problematic for the facility because the supervisor is responsible for promptly setting adequate staffing for the entire shift.

Smith's other argument regarding the appropriateness of the penalty imposed relies on her continued assertion that the one-day suspension should not have been issued. She maintains the absence which formed the basis of the one-day suspension was an FMLA-qualifying absence. Thus, since the one-day suspension was not appropriate, Smith asserts the discipline at issue here is not progressive because it is built on a prior discipline she should not have received.

Under the record presented, any appeals of the one-day suspension have been exhausted and the one-day suspension stands as issued. PERB has held that unsuccessful disciplinary appeals cannot be revived in later appeals of subsequent disciplinary actions. *Kirchner and State of Iowa (Dep't of Human Servs.- Indep. Mental Health Inst.)*, 19 ALJ 102196 at 20; *Alleman and State of Iowa (Dep't of Revenue and Fin.)*, 97-MA-07 at 12. As such, Smith cannot revive a challenge of the one-day suspension in this appeal. The three-day suspension at issue here follows directly from the one-day suspension that is final and no longer subject to

any appeals. GRC followed progressive discipline in addressing Smith's attendance and punctuality issues.

Smith also alleges the existence of disparate treatment in enforcing the attendance and punctuality work rule among supervisors between the three shifts. She claims the PM and NW supervisors are held to a "higher standard" and disciplined over attendance and punctuality issues while GRC has failed to provide proof that AM supervisors are also disciplined for the same attendance issues.

Just cause requires the employer to treat similarly situated employees in the same manner when enforcing policies and work rules. *Kuhn*, 04-MA-04 at 42. In this case, GRC has provided numerous examples of disciplines given to other RTS's under the same DHS attendance work rule at issue here. While the disciplines put forth were not from the AM shift, they are examples of disciplines given to similarly situated employees. GRC has demonstrated that meeting attendance and punctuality expectations is more critical on the PM and NW shifts when considering that those shifts have fewer supervisors who are responsible for timely setting adequate staffing for the entire facility. The attendance and punctuality expectations GRC had for Smith are most comparable to the expectations it has for other RTS's on the PM and NW shift. GRC has shown it has disciplined those RTS's and it has done so in a progressive manner similar to Smith's situation.

The State has demonstrated that Smith was aware of the attendance and punctuality work rule and expectations that applied to her as a NW RTS. It has similarly demonstrated sufficient proof that Smith failed to follow the call-in procedure on January 27 and failed to report to work as scheduled on February 2,

2018. Other similarly situated supervisors are also held accountable to the same attendance expectations and have been progressively disciplined when they fail to follow those expectations. The three-day suspension at issue was progressive in nature after Smith failed to correct her attendance and punctuality issues following the one-day suspension.

Under the totality of the circumstances presented, the State has demonstrated just cause to discipline Smith with a three-day suspension. Consequently, I propose the following:

ORDER

The state employee disciplinary action appeal filed by Tracy Smith is hereby DISMISSED.

The cost of reporting and of the agency-requested transcript in the amount of \$848.20 are assessed against Appellant Tracy Smith pursuant to Iowa Code subsection 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).

This proposed decision and order will become PERB's final agency action on the merits of Smith's appeal pursuant to PERB rule 621—11.7 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.

DATED at Des Moines, Iowa this 19th day of August, 2019.

/s/ Jasmina Sarajlija
Administrative Law Judge

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