

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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STATE OF IOWA (IOWA	)	Case No. CVCV056325
WORKFORCE DEVELOPMENT),	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
IOWA PUBLIC EMPLOYMENT	)	<b>ORDER ON JUDICIAL</b>
RELATIONS BOARD,	)	<b>REVIEW</b>
	)	
Respondent.	)	

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Before the court is Petitioner the State of Iowa, Iowa Workforce Development’s (IWD) Petition for Judicial Review of final agency action in a contested case. Oral argument on the Petition was held on November 29, 2018. Representing IWD was Assistant Attorney General Molly Weber. Representing Respondent Iowa Public Employment Relations Board (PERB) was attorney Diana Machir. Oral argument was not reported.

Upon review of the certified agency record, the court file and the parties’ oral arguments in light of the relevant law, the court enters the following order affirming PERB’s final order and dismissing the Petition for the following reasons.

**BACKGROUND FACTS AND PROCEEDINGS**

At the time of the events at issue, Doug Brooks (Doug) was a workforce development manager for IWD. (Tab 13, App. A at p. 2). IWD is a department of the State of Iowa created to “administer the laws of this state relating to unemployment

compensation insurance, job placement and training, employment safety, labor standards and workers' compensation. Iowa Code § 84A.1(1) (2017).<sup>1</sup>

From May 2009 through March 31, 2016, Doug was a supervisor in the Promise Jobs program at IWD. (Tab 13 at p. 1; App. A at p. 2). Promise Jobs is a federally funded program and its mission is to remove barriers to employment. (Tab 13, App. A at p. 3). At all material times, Jennifer Reha (Jennifer) was a supervisor at a higher level than Doug. (Tab 25 at 84:16-19). At all material times, Jason Landess (Jason) was a supervisor at a higher level than Doug and Jennifer. (Tab 13, App. A at p. 3).

Sometime in the fall of 2015, IWD advertised a vacancy for a bilingual workforce advisor on the Promise Jobs team that Doug supervised. *Id.* A permanent state employee at a different agency identified as "IV" applied for the vacancy and disclosed on her initial application that she had a visual disability. *Id.* During the application process she did not disclose to Doug that she needed a private office. (Tab 25 at 115:10-12). IV's visual disability involves sensitivity to bright lights. (Tab 13, App. A at p. 5).

Doug hired IV in December 2015. (Tab 13 at p. 1). IV began her employment with IWD on January 15, 2016. (*Id.*).

Due to her disability, IV required accommodations to her workspace and technology. (*Id.*). An IWD management analyst conducted a workspace survey related to IV's needs and set forth her conclusions in the Ergo Report (the Report) dated December 22, 2015. (Tab 24, S-6, at 26-31.). The thrust of the Report was that IV needed a real office with four floor-to-ceiling walls and a door, which would offer IV the best chance to ameliorate her heightened sensitivity to light. (*Id.* at 30-31).

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<sup>1</sup> All references herein are to the 2017 Iowa Code unless otherwise indicated.

The administrative law judge (ALJ) found that when Doug was later requested by Jason to identify an IWD employee who would be required to vacate an office to accommodate IV's needs, he said such a request was "bullshit." (Tab 13, App. A at p. 14). Jason reported this conversation to senior management. (Tab 25 at Tr. 67:25 – 68:9).

The IWD Director ultimately asked the Iowa Department of Administrative Services (DAS) to conduct an investigation to determine whether Doug had discriminated against IV. (Tab. 24, S-2, at p. 1). Several employees, including Doug, Jennifer and Jason were interviewed as part of the investigation. (Tab 13, App. A at p. 25). Jennifer moved IV into an office while Doug was on vacation. (*Id.* at p. 31). One week later Doug was placed on administrative leave. (*Id.* at 35).

Approximately one month after Doug was placed on administrative leave, DAS completed its investigation. (Tab 24, S-2 at p. 9). DAS concluded that Doug had violated the State policy and IWD work rules by discriminating against IV based upon her disability. (*Id.*) IWD decided that the appropriate discipline was to terminate Doug's employment, which happened roughly two weeks after the DAS investigation was concluded. (Tab 13, App. A at p. 36; Tab 24 at p. S-3).

Doug filed a non-contract grievance, which was denied. (Tab 4A). Following a subsequent evidentiary hearing on Doug's Iowa Code section 8A.415 appeal, the ALJ issued a Proposed Decision and Order. (Tab 13, App. A). About four months later, PERB issued a Decision on Review. (Tab 13). PERB concluded that IWD did not establish just cause for terminating Doug's employment. (*Id.* at p. 3).

IWD then filed the instant Petition. (05/18/18 Petition for Judicial Review).

## SCOPE OF REVIEW

Judicial review of final agency action in a contested case is governed by the Iowa Administrative Procedure Act, Iowa Code chapter 17A. District courts function in an appellate capacity when reviewing agency decisions. *Bd. of Regents v. Iowa Pub. Emp't Relations Bd.*, 861 N.W.2d 268, 271 (Iowa Ct. App. 2014) (citation omitted).

Iowa Code section 17A.19(10) governs judicial review of agency decisions. *Burton v. Hilltop Care Ctr.*, 813 N.W.2d 250, 255 (Iowa 2012). The court may grant relief if the agency action has prejudiced the substantial rights of the petitioner and the agency action meets one of the enumerated criteria in section 17A.19(10)(a) through (n). *Id.* at 256.

Here, IWD alleges PERB's findings on the two issues preserved for judicial review are

[b]ased upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole.

Iowa Code § 17A.19(10)(f).

The court may affirm the agency action or remand to the agency for further proceedings. Iowa Code § 17A.19(10).

## ANALYSIS

IWD's arguments are fairly straight-forward. IWD contends:

1. PERB's decision to reject the ALJ's finding that Doug claimed he would not have hired IV had he known he would be required to take away the private office space of a more senior employee;
2. PERB's finding that Doug's conduct did not constitute a violation of the IWD work rule or the State's Equal Opportunity, Affirmative Action, and Anti-Discrimination policy (the State policy); and

3. PERB's finding that there was not just cause for Doug's termination, even with a finding that he violated the work rule and the State policy.

Each of these arguments will be addressed in turn.<sup>2</sup>

**A. Whether substantial evidence supports PERB's finding that Doug did not make an allegedly discriminatory comment.** The first dispute is whether PERB's finding on this point is supported by substantial evidence. IWD argues this finding was not supported by the record as a whole due to the ALJ finding the contrary. IWD relies heavily upon the language in section 17A.19(10)(f) stating that "when that record is reviewed as a whole" includes "any determinations of veracity by the presiding officer who personally observed the demeanor of the witnesses." Because PERB simply relied on the record, and not live testimony, IWD posits that PERB should have completely deferred to the ALJ's factual findings related to this issue.

PERB provides a very compelling response to this argument. PERB compares the dynamics at play in this case to the dynamics of a workers' compensation case. In a workers' compensation case, the commissioner often simply reviews the administrative record without a live evidentiary hearing, and may overturn the factual findings of the deputy commissioner who presided over the evidentiary hearing. PERB goes on to cite case law indicating that the factual findings the court must analyze are those directly appealed from – in this case, PERB's findings, not the ALJ's. PERB quotes the Iowa court of appeals as stating:

Making a determination as to whether evidence "trumps" other evidence or whether one piece of evidence is "qualitatively weaker" than another piece of evidence is not an assessment for the district court or the court of

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<sup>2</sup> The State waived its unreasonable, arbitrary, capricious or an abuse of discretion issue under section 17A.19(10)(n) at oral argument on November 29.

appeals to make when it conducts a substantial evidence review of an agency's decision . . . The reviewing court only determines whether substantial evidence supports a finding "according to those witnesses whom the [commissioner] believed."<sup>3</sup>

Further, PERB cites the Iowa Supreme Court's (the Court) decision in *Iowa State Fairgrounds Security v. Iowa Civil Rights Commission*, where the Court stated:

Giving elevated status to a hearing officer's proposed decision when the agency reaches a contrary decision without explaining how it arrived at a different view of the probative force of the evidence would introduce an unwarranted complication into the substantial evidence test. We decline to take that step.<sup>4</sup>

When these two conclusions—which are still good law—are combined, it is clear that Iowa case law does not support IWD's position that PERB's factual findings are inherently inferior to those of the ALJ. The district court is required to examine the support for PERB's findings in light of the record—of which the ALJ's credibility determinations are but one factor/aspect. IWD offers virtually nothing to rebut this argument.<sup>5</sup>

Examining the factual dispute at the center of this point, it is clear that the issue lies with the fact that there are only two witnesses who could possibly speak to whether Doug made the alleged comment: Doug and Jennifer. Jennifer claims he made the

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<sup>3</sup> *Miron Const. v. Poula*, 2012 WL 1058231, at \*3 (Iowa Ct. App. March 28, 2012) (quoting *Arndt v. City of Le Claire*, 728 N.W.2d 389, 394-95 (Iowa 2007)) (emphasis added).

<sup>4</sup> 322 N.W.2d 293, 295 (Iowa 1982).

<sup>5</sup> The full extent of IWD's rebuttal on this point is as follows: "It is true that the record shows [Doug] denied making [the alleged comment]. The question is whether his denial, combined with the rest of the record, are substantial evidence—enough quantity and quality that would be deemed sufficient by a neutral, detached, and reasonable person to decide that no such statement was made. IWD contends that PERB's decision not to adopt the ALJ's fact finding on the second comment was not supported by substantial evidence in the record before the court when that record is viewed as a whole." (Reply Brief at p. 2).

comment; Doug denies it. It is clear that PERB found Doug a more credible witness overall. In that sense, there is substantial evidence to support PERB's finding.

**B. Whether substantial evidence supports PERB's finding that Doug did not violate an IWD work rule or State policy.** The crux of the State's argument on this issue is its belief that the record clearly indicates Doug violated an IWD work rule and State policy by: (1) expressing hostility towards providing IV a private office space as a work accommodation; and (2) "delaying" moving IV into a private office after being instructed to do so.

However, as demonstrated by PERB's brief, IWD does not give the full picture of the facts and context behind Doug's actions. Namely, IWD neglects to discuss Doug's various attempts to work directly with IV to find reasonable work accommodations for her eye condition. These attempts included: (1) a myriad of temporary solutions while a long-term solution was still being worked out; (2) attempts to rectify any delays or technical issues that arose during the entire process; and (3) steps taken to facilitate IV's move into a private office space.<sup>6</sup> In essence, IWD leaves out some very significant factual context in a manner that paints Doug in as poor a light as possible.

As with the previous issue, there is substantial evidence to support PERB's finding. The record demonstrates that Doug made numerous attempts to provide IV with accommodations, cooperated with IV and other IWD staff to facilitate those accommodations, and once Doug was directed to provide IV with a private office space, he took the steps necessary to facilitate that move. The only evidence in IWD's favor is that Doug (1) briefly expressed frustration towards having to remove a senior employee from an office for IV and (2) asked for a delay in moving IV while she was still in

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<sup>6</sup> (Resp. Brief at pp. 6-14; 21-22).

training (though he apparently did this to coordinate with planned updates to the office). The standard for substantial evidence is not whether a reasonable person could conclude differently, but whether a reasonable person could not reach the same conclusions as PERB. IWD does not meet that standard here.

**C. Whether PERB’s conclusion that there was not just cause to terminate Brooks was an abuse of discretion.** As noted above, at oral argument IWD waived this issue. Had that not occurred, the court’s analysis of this issue would have been as follows.

IWD’s position on this issue is problematic from the outset, as it rests largely on the court finding in its favor on the previous issue. Without a finding that Doug violated the work rule and/or State policy, it is indisputable that there was not just cause for Doug’s termination. That said, even with a favorable finding on that issue, IWD’s argument on this issue would still be unavailing.

The core disputes are whether Doug was properly notified of his alleged violations prior to his termination, and whether progressive punishment was possible in Doug’s case. IWD argues that Doug was clearly on notice, as he was familiar with the work rule and State policy and his termination letter contained the statutory and policy grounds for his dismissal. IWD further points to the fairness of the DAS investigation, noting the DAS investigator was a disinterested, neutral party. PERB rebuts this by arguing that throughout the investigation, Doug was kept in the dark about the nature of the investigation—with indications that Doug believed he was being investigated for making the alleged “bullshit” comment to his supervisor, Jennifer. Ultimately, this dispute is not as dispositive as the second dispute.



There, the State argues that progressive punishment was not available in this case given Brooks' position and the alleged gravity of his violation.<sup>7</sup> Yet, put into the larger context provided by PERB, this argument falters significantly. As PERB notes, Doug had a lengthy career with IWD—with no disciplinary issues, glowing performance reviews, and no history of discriminatory behavior. Further, Doug made several attempts to cooperate with IV and IWD staff to provide IV with any necessary accommodations, as well as attempts to rectify any issues in that process as they arose.

To suggest that Doug's singular expression of frustration and later request for a delay in moving IV to a private office (which Jason, the ultimate supervisor, agreed to) was not only a violation of an IWD work rule and State policy, but a grave one at that, is unreasonable and unsupported by the certified agency record. IWD's position rests almost entirely on the district court (1) accepting IWD's argument on the first issue, and (2) interpreting Doug's motive in requesting the delay. This is insufficient to demonstrate that PERB's contrary conclusion was an abuse of discretion.

### **CONCLUSION**

IWD's challenge to PERB's decision fails on all three grounds. Under chapter 17A PERB is permitted to differ in its factual findings from the findings made by the ALJ, and the proper focus of the district court's review is whether those findings are supported by substantial evidence. It is not enough for IWD to essentially point out an equally valid finding supported by the record.

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<sup>7</sup> "The context of Brooks' employment matters—the fact that he was a supervisor in a program with the mission to remove barriers to employment . . . . Ultimately, Mr. Brooks' actions are serious enough to warrant summary discharge from employment, regardless of his longevity with the State, his lack of prior discipline, and his positive performance evaluations." (Reply Brief at p. 3, ¶ 2).

Further, IWD leaves out significant context in its rendition of the record. This context demonstrates sufficient support for PERB's conclusion that Doug did not violate either the IWD work rule or State policy.

Finally, if IWD had pressed its abuse of discretion argument, IWD's argument for a finding of just cause rests almost entirely on the district court finding in its favor on the previous two issues. Otherwise, it fails. As a result, PERB's decision should be affirmed and IWD's Petition should be dismissed.

**ORDER**

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the decision of the Iowa Public Employment Relations Board is **AFFIRMED** and the Petition for Judicial Review filed by the State of Iowa, Iowa Workforce Development is **DISMISSED WITH PREJUDICE**.

Costs are assessed to Petitioner the State of Iowa, Iowa Workforce Development.



State of Iowa Courts

**Type:** OTHER ORDER

**Case Number** CVCV056325  
**Case Title** STATE OF IOWA VS IOWA PUBLIC EMPLOYMENT RELATIONS

So Ordered

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Jeanie Vaudt, District Court Judge,  
Fifth Judicial District of Iowa