

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

)	
	)	CASE NOS.
DAWN R. FULTON,	)	10-MA-03
FREDERICK A. PASKER,	)	10-MA-04
JENIFER L. GODWIN,	)	10-MA-05
LORA J. GEORGE,	)	10-MA-06
KELLY W. JOHNSON,	)	10-MA-07, -08
MARCELLA A. STROUD,	)	10-MA-09
RANDY D. STROUD,	)	10-MA-11, -12
MATTHEW R. THORNTON,	)	10-MA-14
RONALD R. MOWER,	)	10-MA-15
AMANDA C. ROXBERG,	)	10-MA-19
RUTH E. STOCKBRIDGE,	)	10-MA-20
RYANN R. BUFFINGTON,	)	10-MA-22
ROBERT P. ENSMINGER II,	)	10-MA-23, -24
JEREMY L. ENGEMAN,	)	10-MA-25
BOBBI DIANE EVANS,	)	10-MA-26
SHELLEY L. MERSCHBROCK,	)	10-MA-28
KEVIN D. BIRDSSELL,	)	10-MA-30, -31
JAMES C. TWEDT,	)	10-MA-32
Appellants,)	
)	
and)	
)	
STATE OF IOWA (DEPARTMENT OF)	
CORRECTIONS),)	
Appellee,)	
)	
and)	
)	
AFSCME/IOWA COUNCIL 61,)	
Intervenor.)	

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RELATIONS BOARD

DECISION AND ORDER

Now pending before the Public Employment Relations Board (the Board or PERB) are outstanding issues concerning the remedies available for four appellants: Marcella A. Stroud (Stroud), Ronald R. Mower (Mower), Bobbi Diane Evans (Evans), and Shelley L. Merschbrock (Merschbrock) (collectively, the

Remaining Appellants). The Board issued a Decision and Order on August 29, 2011 (August Order), holding that Appellee State of Iowa (the State) failed to substantially comply with certain Department of Administrative Services (DAS) rules when laying off employees in its Department of Corrections (DOC) in 2009. The Board ordered the State to make the adversely affected appellants whole and retained jurisdiction to resolve issues concerning the specific remedy for each individual appellant. Subsequently, the parties reached remedial agreements for fourteen of the eighteen appellants, but did not come to agreements for the four Remaining Appellants. For the following reasons, the Board concludes the Remaining Appellants have no remedy available to them.

PROCEDURAL HISTORY

The Remaining Appellants filed their grievances with DAS in December 2009 and January 2010, alleging violations of various statutory and regulatory provisions. In her grievance, Stroud contended the State violated Iowa Code § 8A.413, as well as four provisions of DAS rules, including paragraph (f) of subrule 11-60.3(2).¹ She requested DAS enjoin the implementation of DOC's reduction in force plan and allow her to exercise her bumping rights provided for in subrule 11-60.3(5). Mower and Merschbrock both asserted that (i) "DOC failed to notify me in

¹ All citations to statutory provisions and DAS rules are to those in effect at the time of the reduction in force at issue.

writing of my options or assignment changes during the various steps in the reduction in force process"; and (ii) "DOC []effectively denied my bumping rights as provided by DAS rules by implementing a reduction in force plan based upon an agreement between the State of Iowa and AFSCME to suspend management bumping rights until June 30, 2011." Mower and Merschbrock then requested: (i) that their layoffs be postponed until a series of stated actions occurred, including notification of their "options"; (ii) "payment of all wages, benefits and punitive damages incurred after January 19, 2010 as a result of my lay off"; and (iii) reinstatement to their previous positions. Evans alleged violations of rule 11-60.3(8A), but did not specify a subrule. Instead, she indicated that her layoff was illegal because it diminished library services to inmates, which, she contended, are essential. Evans asked to be restored to her position.

When the grievances were denied at the third step of the uniform grievance procedure established by DAS rule 11-61.1(8A), the Remaining Appellants, along with fourteen other former merit-system DOC employees, appealed to PERB in accordance with Iowa Code § 8A.415. AFSCME/Iowa Council 61 (AFSCME) intervened in each of the appeals, which were consolidated due to their presentation of common issues.

Following the parties' submission of a joint stipulation of facts, their presentation of oral arguments, and briefing, the Board issued the August Order, concluding, in part, that (i) the State failed to substantially comply with subrule 11-60.3(5); (ii) the State failed to substantially comply with paragraphs (e) and (f) of subrule 11-60.3(2) because it had not notified the appellants of their bumping rights; and (iii) the appellants had not established the State's failure to substantially comply with Iowa Code § 8A.413. At the time of the August Order's issuance, the Board did not identify those appellants who had fairly alleged a violation of either paragraph (e) or paragraph (f) of subrule 11-60.3(2). The August Order explicitly stated that it constituted final agency action on the issue of whether the appellants had established the State's lack of substantial compliance with subchapter IV of Iowa Code chapter 8A and DAS rules; no party sought judicial review in the District Court of this final agency action. The Board also described, in general terms, the remedy due each appellant and retained jurisdiction to enter whatever orders were necessary or appropriate in order to specify the precise terms of the appropriate remedy for any appellant.

When the parties failed to agree upon the specifics of the remedies for the Remaining Appellants, the Board scheduled a hearing to receive evidence and arguments relevant to their

particular situations. The hearing was held on January 10, 2012, at PERB's offices in Des Moines. Charles Gribble appeared on behalf of the Remaining Appellants, and Karen Kienast appeared on behalf of the State; AFSCME did not appear. The Board received evidence, including testimony from Stroud, Mower, and DOC's Director of Human Resources, Susie Pritchard.² The Remaining Appellants and the State then submitted post-hearing briefs in further support of their respective positions. After consideration of all evidence and arguments received, the Board makes the following:

FINDINGS OF FACT

Even if the State had complied with DAS subrule 11-60.3(5) in connection with the Remaining Appellants' layoffs, none of them would have been able to bump (displace) another employee in lieu of being laid off due to their individual circumstances.

Had they sought to do so at the time of the DOC reduction in force, none of the Remaining Appellants would have been able to avoid layoff by voluntarily demoting or transferring to another position within the DOC. The grant or denial of intra-agency demotion or transfer is within the discretion of the appointing authority and DOC would not have approved a voluntary

² Board Member Janelle L. Niebuhr was not present, but subsequently reviewed the audio recording of this hearing and the remainder of the record and has participated fully in this decision.

demotion or transfer by any of the Remaining Appellants because no open positions within DOC existed at that time.

There is no evidence that any other State agency had open positions into which any of the Remaining Appellants could have conceivably demoted or transferred. Nor is there evidence that any other agency would have approved a voluntary demotion or transfer request by any of the Remaining Appellants had an open position existed.

CONCLUSIONS OF LAW

When fashioning an appropriate remedy in Iowa Code § 8A.415 cases such as these, we attempt to make prevailing employees whole by placing them in the positions they would have been in had there been compliance with the statute or rule in question. *See, e.g., Israni v. State (DNR), 92-MA-23 (PERB 1993)*. Under this standard, no affirmative remedy is appropriate when the appealing employee has not been adversely affected by the lack of compliance. In § 8A.415(1) cases such as these, the appellant bears the burden of establishing the State's failure to comply with an identified provision of a DAS rule or subchapter IV of Iowa Code chapter 8A. *See, e.g., Front v. State (DAS), 07-MA-01 & 02 (PERB 2010); Studer v. State (DHS), 98-MA-12 (PERB 2000)*. It follows that the appellant in a § 8A.415(1) case must also bear the burden to establish his or her

entitlement to affirmative remedial relief for any violation which may be established.

Both Stroud and Mower acknowledge they are not entitled to a substantive remedy for the State's failure to substantially comply with subrule 11-60.3(5) since neither would have been able to bump another employee had there been compliance with the subrule. Evans and Merschbrock have made no such concession and thus, facially at least, claim entitlement to a remedy for the State's noncompliance with subrule 11-60.3(5). All of the Remaining Appellants assert they are entitled to remedies under three other theories: (i) the State's failure to substantially comply with DAS rule 11-60.3 notification requirements; (ii) the State's alleged failure to substantially comply with the rulemaking requirements of Iowa Code § 8A.413; and (iii) the State's alleged violations of its collective bargaining agreements with AFSCME and UE Local 893/Iowa United Professionals (IUP). The Board addresses each of these arguments in turn.

A. Subrule 11-60.3(5)

In its August Order, the Board held that the State had failed to substantially comply with subrule 11-60.3(5) by denying all appellants the bumping rights provided for in that subrule. It specifically noted, however, that "[i]t could be that some [a]ppellants might not have been able to successfully

displace another employee." August Order, pp. 21-22. Both Stroud and Mower concede they could not have successfully displaced other employees even if the State had fully complied with subrule 11-60.3(5). The Board has found this to be the case for Evans and Merschbrock as well. Had the State afforded the Remaining Appellants the bumping rights specified in the subrule, their exercise of those rights would have been unavailing. Accordingly, no remedy can be afforded to them for the State's failure to substantially comply with subrule 11-60.3(5).

B. Rule 11-60.3 Notification Requirements

1. Paragraph (f) of Subrule 11-60.3(2)

The Remaining Appellants posit they are entitled to reinstatement and back pay for violations of paragraph (f) of subrule 11-60.3(2)³ because the State did not notify them of certain "options" allegedly available in lieu of lay off, in particular, the options to bump, voluntarily demote, or transfer.

Before delving into the merits of the Remaining Appellants' arguments on this point, the Board must first determine which appellant, if any, has properly brought this issue before it. In the August Order, the Board did not specifically identify

³ The Remaining Appellants refer to 90.3(2)(f) on page 10 of their brief. The Board assumes this is merely a typographical error and that the Remaining Appellants intended to cite subrule 11-60.3(2)(f).

those appellants who had fairly alleged violations of the notification provision in paragraph (f) of subrule 11-60.3(2), finding it unnecessary at that time. See August Order, p. 18, n. 6. As noted above, Evans made no mention of this provision, nor did she refer to improper or the lack of notification, at any point in the proceedings on her grievance prior to the hearing held on January 10, 2012. It is well settled that § 8A.415(1) proceedings are quasi-appellate in nature, occurring only after prior steps in the uniform grievance procedure have been exhausted, and therefore, claims asserted for the first time on appeal to PERB cannot form the basis for § 8A.415(1) relief. See, e.g., *Cooper v. State (DHR)*, 97-MA-12 (PERB 1998); *Israni*, 92-MA-23; *Knight and Durham v. State (DOT)*, 97-MA-02 (ALJ 1998); *Bessman v. State (DPS)*, 93-MA-17 & 94-MA-10 (ALJ 1994). For this reason, Evans cannot assert this new claim at this late stage in the proceedings or seek a remedy based upon it.

However, it might be said that Stroud, Mower, and Merschbrock did fairly allege violations of paragraph (f) of subrule 11-60.3(2) in their grievances. They are entitled to a remedy for the State's failure to notify them of their options, but only if such notification would have altered the position they are in now. See, e.g., *Israni*, 92-MA-23. In this case, Stroud, Mower, and Merschbrock would each be in their current

position even if the State had provided them with the notification to which they claim they were entitled. The Board has found that they could not have successfully displaced other employees by exercising their bumping rights, and they presented no evidence that establishes any position was available, within DOC or elsewhere, into which they could have voluntarily demoted or transferred. Even if the State had not violated the subrule 11-60.3(2)(f) notification requirement, Stroud, Mower, and Merschbrock have not established any entitlement to remedial relief because no evidence supports their ability to successfully displace other employees, voluntarily demote, or transfer.⁴

2. Paragraph (e) of Subrule 11-60.3(2)

In the August Order, the Board also concluded the State failed to substantially comply with paragraph (e) of subrule 11-60.3(2), which requires the State to provide employees affected by a reduction in force with written notice of "the employee's rights under these rules." The Remaining Appellants did not

⁴ The Board questions whether the theories that the State failed to notify Stroud, Mower, and Merschbrock of their options to voluntarily demote or transfer are properly before it. In the August Order, the Board issued its final agency action on liability. Although they raised subrule 11-60.3(2)(f) in their grievances, the Remaining Appellants did not assert voluntary demotion or transfer theories of liability at any time prior to the hearing on January 10, 2012, but instead based their claim on the failure to notify them of their bumping rights. Nor did they seek rehearing of the August Order or judicial review. Additionally, questions remain as to whether voluntary demotion and transfer fall within the purview of subrule 11-60.3(2)(f). However, regardless of whether these theories are properly before PERB or are within the scope of the notification provision, the Board has ultimately determined that no remedy is available to Stroud, Mower, and Merschbrock on any of these grounds.

address this provision in their post-hearing brief, indicating they had no argument to support a remedy under it. Even if this apparent abandonment of this remedial theory is not viewed as a waiver, it fails for the same reasons the Board concluded relief could not be granted under paragraph (f) of subrule 11-60.3(2).

C. IOWA CODE § 8A.413

The Remaining Appellants contend the State failed to consider their performance records when evaluating their bumping rights in violation of § 8A.413. In its August Order, the Board concluded that the appellants, including the Remaining Appellants, "have not established the State's failure to substantially comply with the rulemaking requirements of Iowa Code section 8A.413." p. 10.

As noted earlier, the August Order was the Board's final decision on the question of whether the State had substantially complied with the statutory and rule provisions identified by the appellants in their grievances; no party sought rehearing or judicial review of that final decision. The only question remaining is whether remedial relief is due to the Remaining Appellants for violations identified in the August Order. No remedial relief is appropriate or available to any appellant for a violation not established during the earlier "liability" stage of the proceedings.

Even if the Board views this prong of the Remaining Appellants' arguments not as the assertion of a new claim or an attempt to relitigate a claim rejected in the August Order, but instead as a purely remedial issue arising only after the issuance of that Order, the Board still concludes that the Remaining Appellants are not entitled to remedial relief on this ground. Iowa Code § 8A.413 does not mention bumping, much less require that an employee's performance record be considered in determining whether he or she could successfully displace another employee in lieu of layoff. Therefore, a failure to give consideration to employee performance in determining whether bumping is available in a given case is not a violation of § 8A.413.

D. CONTRACT VIOLATIONS

The Remaining Appellants assert that, although they were non-contract employees at the time, the identification of the employees to be laid off should have been conducted pursuant to the provisions of the State's collective bargaining agreements with AFSCME and IUP, and that the State violated those contracts when it determined who would be laid off. The Remaining Appellants further argue the union contracts are applicable because the State evaluated their ability to bump AFSCME- and IUP-represented employees in accordance with the provisions of

those agreements. This argument provides no basis for remedial relief for at least two reasons.

First, the implicit claim that a collective agreement controlled the question of which non-contract DOC employees would be laid off, and that the collective agreements were violated, is a new claim that was not asserted during the "liability" stage of the proceedings. It cannot be asserted for the first time now, where we are concerned only with the availability of affirmative remedies for the violations previously established. See, e.g., *Cooper*, 97-MA-12. And even if the Remaining Appellants had asserted that a collective agreement had been violated, it would have failed to state a claim for Iowa Code § 8A.415(1) relief because, in such cases, PERB's authority is limited to determining whether there was substantial compliance with DAS rules or subchapter IV of Iowa Code chapter 8A and does not extend to resolving contract disputes.

Second, the argument that collective agreements controlled the Remaining Appellants' layoffs is incorrect and confuses two distinct topics: (1) layoff procedures for non-contract employees, which is controlled by DAS rules, and (2) the evaluation of an employee's bumping rights, which requires an application of the terms of a collective bargaining agreement if the non-contract employee seeks to displace a contract-covered

employee. See Iowa Code § 8A.413(16) & DAS subrule 11-60.3(5) (providing that, if bumping from a non-contract class to one covered by a collective bargaining agreement, the bump shall occur only if it can be accomplished in accordance with the reduction in force order that governs the contract-covered class).

The collective agreements do not nullify the layoff procedures outlined in subrule 11-60.3(5), rather the subrule requires the parties to evaluate the Remaining Appellants' ability to bump contract-covered employees in accordance with the applicable collective bargaining agreement. Nor do the collective agreements substitute their substantive layoff procedures for those contained in subrule 11-60.3(5). Stated differently, the collective agreements do not apply to the identification of which non-contract employees will be laid off in the course of a reduction in force; the agreements only control which contract-covered employee, if any, can be displaced should it be determined that a non-contract employee will be laid off. Therefore, even had the Remaining Appellants established that they would not have been laid off had they been in contract-covered positions, they are entitled to no remedial relief here because the DAS rule, and not any collective agreement, controlled the determination of who would be laid off.

CONCLUSION

For the above-stated reasons, the Remaining Appellants have failed to establish their entitlement to any affirmative remedial relief for any of the State's failures identified in our Decision and Order dated August 29, 2011. It is, therefore,

ORDERED that the State, having implemented the make-whole remedy previously prescribed for the other fourteen appellants, need not provide Stroud, Mower, Evans, or Merschbrock with any affirmative relief in this matter.

This decision constitutes final agency action on the remedial aspects of these cases.

DATED at Des Moines, Iowa, this 30 day of April, 2012.

PUBLIC EMPLOYMENT RELATIONS BOARD

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