

STATE OF IOWA  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

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SHARON WILKERSON-MOORE,	)	
Appellant,	)	
	)	
and	)	CASE NO. 100788
	)	
STATE OF IOWA (DEPARTMENT OF	)	
HUMAN SERVICES-FISCAL	)	
MANAGEMENT DIVISION),	)	
Appellee.	)	

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**RULING AND ORDER**

On April 13, 2018, the State of Iowa (Department of Human Services–Fiscal Management Division) filed a petition for judicial review of the Public Employment Relation Board’s decision on review regarding the above-referenced State employee disciplinary action. Concurrently and pursuant to Iowa Code section 17A.19(5)(a) and rule 621 IAC 9.7, the State filed with the Public Employment Relations Board (PERB or Board) an application to stay our remedial order during the pendency of judicial review of the final agency action on the merits.<sup>1</sup>

The State requests a stay of the execution or enforcement of the Board’s order requiring Wilkerson-Moore’s reinstatement and other make-whole remedy provisions pending a determination on judicial review by the Polk County District Court. Wilkerson-Moore resists a stay of the portion of our order requiring her reinstatement, but she does not resist a stay of all other make-whole remedy provisions.

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<sup>1</sup> All Iowa Code references are to Iowa Code (2017).

Pursuant to notice, oral arguments on the application to stay were presented to the Board telephonically on April 24, 2018. Attorney Christopher Stewart represented Wilkerson-Moore and attorney Jeff Edgar represented the State. Prior to oral arguments, both parties filed briefs on April 20, 2018.

Based on our review of the parties' briefs and oral arguments, the State's application to stay our remedial order in the above-captioned cause is GRANTED.

# **I. BACKGROUND.**

On December 6, 2016, appellant, Sharon Wilkerson-Moore, filed her state employee disciplinary action appeal with PERB pursuant to Iowa Code section 8A.415(2)(b). Wilkerson-Moore's appeal followed a third-step response by the Iowa Department of Administrative Services' (DAS) Director denying her challenge of the disciplinary action. Wilkerson-Moore was employed as a confidential secretary in the Fiscal Management Division of the Iowa Department of Human Services. She alleged the State did not have just cause to terminate her employment on September 12, 2016. The State alleged there was just cause to support its termination of Wilkerson-Moore.

Both parties were represented by counsel and had an opportunity to present evidence and argument in an evidentiary hearing held before a PERB administrative law judge (ALJ). On December 5, 2017, the ALJ issued her proposed decision and order. The ALJ determined that the

State failed to establish just cause existed to support its termination of Wilkerson-Moore. Based on the totality of circumstances, the ALJ found a five-day suspension was warranted and ordered Wilkerson-Moore's reinstatement to her former position with back pay and restoration of benefits.

The State timely filed a petition for the Board's review of the ALJ's proposed decision and order. In the review proceeding, both parties filed pre-argument briefs and telephonically presented oral arguments to the Board. On March 14, 2018, we issued our decision on review affirming the ALJ's proposed decision and order. For the remedy, we ordered the following:

The Department of Human Services shall reinstate Sharon Wilkerson-Moore to a substantially equivalent position as confidential secretary in the Department of Human Services, with back pay and benefits, less interim earnings; restore her benefit accounts to reflect accumulations she would have received but for her discharge; make appropriate adjustments to her personnel records; and take all other actions necessary to restore her to the position she would have been in had she not been discharged, but had instead received an unpaid five-day suspension.

In the event the parties were unable to reach an agreement on the remedy, we retained jurisdiction of any remedy-related matters and to specify the precise terms of the appropriate remedy if necessary.

On April 13, 2018, the State filed a petition for judicial review of the final agency action in Polk County District Court. *See State of Iowa (Dep't of Human Servs.-Fiscal Mgmt. Div.) v. Iowa Pub. Emp't Bd. and Wilkerson-Moore*, Case No. CVCV056149 (Polk Cnty. Dist. Ct.). Concurrently, the

State filed with PERB its application to stay our remedial order pending judicial review. The State argues a stay should be granted because the Board-ordered remedy will remain available and neither party will be irreparable harmed if the reviewing court affirms PERB's decision. In the absence of a stay and the remedy enforced or executed, the State claims both parties will suffer irreparable injury should the court reverse PERB's decision and uphold Wilkerson-Moore's termination.

Wilkerson-Moore does not resist the State's application for a stay with respect to back pay and benefits. Wilkerson-Moore resists the State's application with respect to reinstatement only and asserts that she will suffer irreparable injury if the stay is granted and she is not immediately reinstated pursuant to the Board's order. Wilkerson-Moore claims she has been without steady and stable employment since her termination and it has created financial difficulties for her.

## **II. ANALYSIS.**

As both parties recognize, the "filing of the petition for [judicial] review does not itself stay execution or enforcement of any agency action." *See* § 17A.19(5)(a). However, a party may seek a stay by filing application with the agency. "Unless precluded by law, the agency may grant a stay on appropriate terms or other temporary remedies during the pendency of judicial review." § 17A.19(5)(a). Consistent with this statutory authority, PERB administrative rule provides for the filing of an application to stay agency action and provides in part, "[t]he board may, in its discretion and

on such terms as it deems proper, grant or deny the application.” See Iowa Admin. Code r. 621–9.7(1).

Although PERB has discretionary authority to grant a stay pursuant to Iowa Code section 17A.19(5)(a), both parties assert PERB should consider four factors that the district courts analyze when making this determination. In previous cases, we have found it appropriate to consider and balance the same factors which must be considered by the court on its review of an agency’s refusal to issue a stay. See *PERB v. Stohr*, 279 N.W.2d 286 (Iowa 1979); *SEIU, Local 199 & Broadlawns Med. Cent.*, 05 PERB 6894. Those factors, specified in Iowa Code section 17A.19(5)(c), are:

- (1) The extent to which the applicant is likely to prevail when the court finally disposes of the matter.
- (2) The extent to which the applicant will suffer irreparable injury if relief is not granted.
- (3) The extent to which the grant of relief to the applicant will substantially harm other parties to the proceeding.
- (4) The extent to which the public interest relied on by the agency is sufficient to justify the agency’s actions in the circumstances.

With respect to the first factor, a stay may be granted where the likelihood of success is not high but the balance of hardships favors the applicant. *Grinnell College v. Osborn*, 751 N.W.2d 396, 402 (Iowa 2008) (quoting *Mohammed v. Reno*, 309 F.3d 95, 101 (3rd Cir. 2002)). The second factor considers the extent to which the employer will suffer irreparable injury. For instance, when an employer pays a judgment during pendency of judicial review and

the district court ultimately reverses the judgment, there are practical impediments for the employer in recovering the overpayments if successful. *See id.* at 402. This factor requires a determination whether the injury is “irreparable” and if so, the extent of the “irreparable injury.” *Id.* at 403. However, the irreparable injury must be certain and actual. *Id.* The third factor requires consideration and balancing of the extent to which a stay would substantially harm the employee or another party to the proceeding. *Id.* Thus, consideration is due to the amount of time needed to complete judicial review and the financial needs of the employee. *Id.* The final factor distinguishes between stays involving the public interest and those involving purely private interests. *Id.* In some cases, the interests of private parties may need to yield to the greater public interest. *Id.*

The applicant has the burden of establishing the prerequisites for a stay of agency action. *Id.* Proof of one factor can excuse another that is lacking and ultimately, the stay can be granted when the balance of hardships weighs in favor of the applicant. *Id.* at 402.

*Consideration and balancing of factors.*

Our review and balancing of these statutory factors lead us to conclude a stay of our remedial order is warranted and the State’s application should be granted.

As the State aptly notes for the first factor, PERB would not agree that the State is likely to prevail in district court. Our decision suffers from none of the grounds for judicial relief specified in Iowa Code section 17A.19(10). Although the State asserts that PERB is not a neutral party akin to a district court evaluating this factor, we are nonetheless confident that the reviewing court will conclude that our findings are supported by substantial evidence and our conclusions are not based upon an irrational, illogical, or wholly unjustifiable application of law to fact. See Iowa Code §§ 17A.19(10)(f) and (m). We thus view it as unlikely that the State will ultimately prevail when the court reviews PERB's final agency action and issues its decision.

With respect to the second and third factors, the balance of hardships favors the State as the applicant. On the one hand, Wilkerson-Moore asserts that a stay will result in substantial harm due to financial difficulties if she is not reinstated and employed by the State during this period of judicial review. On the other hand, the State claims that it will be irreparably injured if no stay is issued and it is required to expend funds that it cannot recoup if it is ultimately successful on judicial review. We agree with the State. On balance, the irreparable injury that would occur to the State in the absence of a stay outweighs any substantial harm that would occur for Wilkerson-Moore if a stay is granted.

We assume as true Wilkerson-Moore's allegation that she has been without steady and stable employment and it has created financial difficulties for her. Nonetheless, she will recover her financial losses if PERB's decision is affirmed on judicial review. The Board's "make-whole" remedy takes the employee's financial losses into account and attempts to place the employee in the position she would have been had no wrongful termination taken place and to make the employee whole for damages incurred. See *Harrison & State of Iowa (Dept. of Human Servs.)*, 05-MA-04 at 5. Thus, the financial damages for Wilkerson-Moore are not irreparable. Although an unfortunate aspect of litigation, we do not view Wilkerson-Moore's situation such that it constitutes substantial harm to an extent that warrants our denial of a stay.

In contrast, the State would be left in a tenuous position and suffer irreparable injury if it is required to reinstate Wilkerson-Moore and the court subsequently reverses PERB's decision and upholds Wilkerson-Moore's termination. Absent a stay, the State would be required to devote time and funds to the reinstatement of Wilkerson-Moore. The State could not recoup these expenditures if it ultimately prevailed in the judicial review proceeding. Additionally, it is also certain the State would not recover the unquantifiable costs of the disruption to services and staffing that would result under these circumstances. There are too many



economical and practical implications to what could be a “temporary” reinstatement of Wilkerson-Moore. Unlike Wilkerson-Moore who can recover her damages if successful, the State cannot recover its training and placement costs, let alone the disruption to staffing, if subsequently successful when the court makes its determination. The State would suffer irreparable injury under these circumstances. The balance of hardships between the parties weighs in favor of granting the State’s application for a stay.

For the reasons discussed above, the public interest would be furthered by our grant of a stay and a delay in the State’s execution of the remedial order pending the court’s decision. The *Rochester* case cited by Wilkerson-Moore clearly affected public interest because it involved public transportation by school bus services. *See Rochester-Genesee Reg’l Transp. Auth. v. Bridgid Hynes-Cherin*, 506 F. Supp.2d 207 (W.D.N.Y. 2007). The *Rochester* Court noted the “chaos and confusion” and the “ripple effect of such disruption in school bus service” for parents and children that would be created without a stay to prevent the cessation of school bus services pending judicial review. *Id.* at 214. However, the case does not support our denial of a stay, as asserted by Wilkerson-Moore; there is no public interest implicated by her delayed reinstatement during the pendency of judicial review. Rather, public interest would be adversely impacted in the absence of a stay if the State is

ultimately successful and unable to recoup expended public funds. Therefore, the public interest factor weighs in favor of a stay of our remedial order.

### **III. CONCLUSION.**

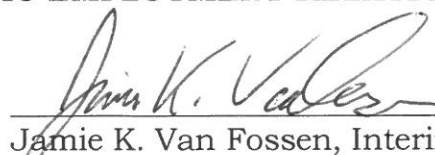
Consideration and balance of the four factors support the State's application to stay our remedial order during the pendency of *State of Iowa (Dep't of Human Servs.-Fiscal Mgmt. Div.) v. Iowa Pub. Emp't Bd. and Wilkerson-Moore*, Case No. CVCV056149 (Polk Cnty. Dist. Ct.). Accordingly, we enter the following:

### **ORDER**

The State's application to stay the enforcement or execution of the Board-ordered remedy in PERB Case No. 100788 is GRANTED. Further proceedings in PERB Case No. 100788 are deferred pending a final decision by the Polk County District Court in Case No. CVCV056149 or until further order of the Board.

DATED at Des Moines, Iowa, this 8th day of August, 2018.

### **PUBLIC EMPLOYMENT RELATIONS BOARD**

  
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Jamie K. Van Fossen, Interim Chair

  
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Mary T. Gannon, Board Member