

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

GARY SANDERS,
Appellant,

and

STATE OF IOWA (EIGHT JUDICIAL
DISTRICT—DEPARTMENT OF
CORRECTIONAL SERVICES),
Appellee.

CASE NO. 102234

RULING AND ORDER

Appellant Gary Sanders filed this state employee grievance appeal with the Public Employment Relations Board (PERB) on August 28, 2018 pursuant to Iowa Code subsection 8A.415(1) and PERB subrule 621—11.2(1). Sanders appeals an unsatisfactory employee performance rating given by his employer, the State of Iowa, Eight Judicial District—Department of Correctional Services.

Now before the undersigned is the State of Iowa's September 19, 2018 motion to dismiss Sanders' grievance appeal for failure to exhaust prior grievance procedure steps available to him and failure to allege a violation of any provision of Iowa Code Chapter 8A, subchapter IV, or a DAS rule. Sanders resisted the motion and submitted a pre-argument brief in support of his resistance. Oral arguments on the motion were held by telephone conference on December 10, 2018. Sanders was represented by union representatives Amber Moats and Robin White. The State was represented by attorney Jeffrey Edgar.

Undisputed Facts and Course of Proceedings

From the parties' filings, the following pertinent facts are undisputed. Sanders is employed by the Eight Judicial District, Department of Correctional Services (hereafter "District"), as a Probation/Parole Officer. On June 1, 2018, Sanders received his annual employee performance evaluation for the May 29, 2017 through May 29, 2018 rating period. He was evaluated over four broad categories: reliability, communication, professionalism, and case work/case documentation. Each of these categories included specific goals and expectations. Sanders was rated as "generally meets" or "fully meets" all the performance goals with one exception. Under the "communication" category, Sanders received a "does not meet expectations" rating for his "communication with management." The evaluating supervisor noted on the evaluation form that Sanders' "attitude toward management is extremely negative" but did not provide any specific examples to support this conclusion. Even with this unsatisfactory rating, Sanders' overall performance was rated as "fully meets expectations."

Sanders expressed his disagreement with the unsatisfactory rating on the evaluation form and highlighted that the employer has failed to cite any specific examples when he failed to communicate with management as was necessary to perform his job. Sanders subsequently appealed his performance evaluation pursuant to the steps outlined in the District's "Dispute Resolution Process" policy that is purportedly designed to resolve general workplace complaints. In accordance with that policy, Sanders submitted a written complaint to the

District's assistant director. His written complaint generally argued that the given rating was "not fair or accurate" and that the supervisor failed to provide any specific examples demonstrating how he failed to communicate with management when necessary for the performance of his duties. He requested for the unsatisfactory rating to be changed to "generally meets expectations." Following review and discussion with the evaluating supervisor, the assistant director decided to uphold the given rating.

Sanders then appealed the assistant director's decision to the District director, who represents the final decision-maker at the District's level pursuant to its dispute resolution process policy. Following separate meetings with the evaluating supervisor, the assistant director and Sanders, the director also decided to uphold the given rating. However, he instructed the evaluating supervisor to meet with Sanders to discuss specific examples underlying the unsatisfactory rating and to clarify her expectations regarding communication with management. Following this meeting with his supervisor, Sanders informed the director that he had an explanation for all the incidents the supervisor referenced during their meeting. He further expressed his position that the dispute resolution process is "seriously flawed" because it does not provide the other side with an opportunity to rebut any information given by the evaluating supervisor prior to the director making his final decision. The director acknowledged the process could have worked better and that the policy would change going forward

to allow for a joint meeting between the involved parties. Even with this acknowledgement, the given rating remained unchanged.

Sanders appealed the District’s decision directly to PERB on August 28, 2018 pursuant to Iowa Code subsection 8A.415(1) alleging he was given an “unfair and unjust evaluation” and that the District’s dispute resolution process is “unfair.” Sanders did not appeal the District’s final decision with DAS prior to initiating the instant appeal with PERB. The State filed its pre-answer motion to dismiss on September 19, 2018.

Applicable Legal Standards

Iowa Code subsection 8A.415(1) establishes the statutory framework and PERB’s jurisdiction in grievance appeals such as the instant case. That section provides:

8A.415 Grievances and discipline resolution.

1. *Grievances.*

a. An employee, except an employee covered by a collective bargaining agreement which provides otherwise, who has exhausted the available agency steps in the uniform grievance procedure provided for in the department rules may, within seven calendar days following the date a decision was received or should have been received at the second step of the grievance procedure, file the grievance at the third step with the director. The director shall respond within thirty calendar days following the receipt of the third step grievance.

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. . . . Decisions rendered shall be based upon a standard of substantial compliance with this subchapter and the rules of the department. Decisions by the public employment relations board constitute final agency action.

As used in Iowa Code chapter 8A, the term “department” refers to the department of administrative services and “director” refers to the director of the department of administrative services or its director’s designee. Iowa Code §§ 8A.101(2)–(3) (2019).

As subsection 8A.415(1) reveals, PERB’s decisions in grievance appeals “shall be based upon a standard of substantial compliance with [subchapter IV of chapter 8A] and the rules of the department [of administrative services].” Thus, in order to prevail, Sanders’ appeal must allege a lack of substantial compliance with a provision of Iowa Code chapter 8A, subchapter IV, or a DAS rule.

Iowa Code subsection 8A.415(1) and the DAS rules implementing chapter 8A also establish the grievance procedure steps to be utilized in appeals initiated pursuant to that subsection. The implementing DAS rules provide, in pertinent part:

Chapter 61 Grievances and Appeals

61.1(1) *Grievance procedure.*

a. Step 1. The grievant shall initiate the grievance by submitting it in writing to the immediate supervisor, or to a supervisor designated by the appointing authority, within 14 calendar days following the day the grievant first became aware of, or should have through the exercise of reasonable diligence become aware of, the grievance issue. The immediate supervisor shall, within 14 calendar days after the day the grievance is received, attempt to resolve the grievance within the bounds of these rules and give a decision in writing to the grievant with a copy to the director.

b. Step 2. If the grievant is not satisfied with the decision obtained at the first step, the grievant may, within 7 calendar days after the day the written decision at the first step is received or

should have been received, file the grievance in writing with the appointing authority. The appointing authority shall, within 14 calendar days after the day the grievance is received, attempt to resolve the grievance within the bounds of these rules by affirming, modifying, or reversing the decision made at the first step, or otherwise grant appropriate relief. The decision shall be given to the grievant in writing with a copy to the director.

c. Step 3. If the grievant is not satisfied with the decision obtained at the second step, the grievant may, within 7 calendar days after the day the written decision at the second step was received, or should have been received, file the grievance in writing with the director. The director shall, within 30 calendar days after the day the grievance is received, attempt to resolve the grievance and send a decision in writing to the grievant with a copy to the appointing authority. The director may affirm, modify, or reverse the decision made at the second step or otherwise grant appropriate relief. If the relief sought by the grievant is not granted, the director's response shall inform the grievant of the appeal rights in subrule 61.2(5).

d. If the grievant is not satisfied with the decision obtained from the third step, the grievant may file an appeal in accordance with subrule 61.2(5).

11–61.2(8A) Appeals.

...

61.2(5) Appeal of grievance decisions. An employee who has alleged a violation of Iowa Code sections 8A.401 to 8A.458 or the rules adopted to implement Iowa Code sections 8A.401 to 8A.458 may, within 30 calendar days after the date the director's response at the third step of the grievance procedure was issued or should have been issued, file an appeal with the public employment relations board. ...

As both Iowa code subsection 8A.415(1) and DAS subrule 11-61.2(5) state, an 8A.415(1) grievance is appealed to PERB only after the appealing employee receives or should have received a third-step response from DAS.

The State's Motion

The State argues the instant appeal should be dismissed on two separate grounds: (1) Sanders failed to exhaust the available grievance procedure steps provided by 8A.415(1) prior to filing his appeal with PERB; and (2) Sanders failed to allege a lack of substantial compliance with any DAS rule or a provision of Iowa Code chapter 8A, subchapter IV. The State contends both grounds constitute a fatal jurisdictional defect and asks PERB to dismiss the appeal in its entirety.¹

Sanders filed a resistance to the State's motion and a pre-argument brief in support of his resistance. The brief contained statutory references to Chapter 62 of the DAS rules that pertain to the establishment and minimum requirements regarding performance planning and evaluation governing all state employees. During oral arguments, Sanders asserted that his 8A.415(1) grievance appeal is premised on a lack of substantial compliance with chapter 62 of the DAS rules.

In response to the State's exhaustion argument, Sanders argued that the District's grievance procedure does not require him to appeal the grievance to DAS. The district director is the last decision-maker pursuant to the District's policy and following his decision, the proper next step of appeal is PERB, not DAS. The State with his position and argued that the grievance steps governing 8A.415(1) appeals are set by that statutory provision and must be followed notwithstanding any separate dispute resolution policies that agencies may adopt.

¹ The State's motion also asserted that Sanders, as an employee of the Department of Correctional Services, Eight Judicial District, which is organized under Iowa Code chapter 905, is not an employee of the State of Iowa for the purposes of Iowa Code chapter 8A, subchapter IV. The State withdrew this basis for dismissal during oral arguments. Consequently, the argument will not be addressed.

Analysis of Law

In ruling on a motion to dismiss, the hearing officer accepts as true the allegations of the appeal and construes any doubts or ambiguities in a light most favorable to the non-moving party. *See, e.g., Callahan and State of Iowa (Dept. of Transp.)*, 04-MA-02 at 2; *Capps and State of Iowa (Dept. of Corr.)*, 03-MA-07/03-MA-09 at 6-7.

The State's first basis for dismissal contends that Sanders failed to exhaust the available grievance procedure steps prior to filing the appeal with PERB. The pertinent facts are not in dispute and Sanders agrees that he did not appeal the District director's decision to DAS before he initiated the instant appeal with PERB. Sanders contends, however, that he exhausted all the available agency steps under the District's grievance procedure policy and thus the appeal is now properly before PERB. Following review and consideration of Sanders' position, I find his argument is not supported by any of the applicable statutory provisions governing 8A.415(1) grievance appeals.

Iowa Code subsection 8A.415(1) allows certain state employees to grieve an employer's alleged failure to substantially comply with a provision of Iowa Code chapter 8A, subchapter IV, or a DAS rule. The same statutory provision and implementing DAS rule 11—61.1 outline the grievance procedure steps to utilize prior to initiating an 8A.415(1) appeal with PERB. Sanders followed the first and second step of the provided procedure by filing his appeal initially with the District's assistant director and then the director. The third step of the grievance

procedure directs that, if the employee is not satisfied with the appointing authority's decision obtained at the second step of the grievance procedure, the third step of appeal is to file the grievance with DAS. Following the decision he received from the District director, Sanders did not exhaust this third step of the grievance procedure prior to appealing the grievance to PERB.

“Precise, unambiguous language will be given its plain and rational meaning in light of the subject matter.” *Carolyn v. Hill*, 553 N.W.2d 882, 887 (Iowa 1996). A plain reading of Iowa Code subsection 8A.415(1) and DAS subrule 61.2(5) demonstrate that Sanders' position regarding the proper next step of appeal following the District's final decision is without merit. The grievance procedure steps are plainly found in the referenced sections and rules, which contemplate that an 8A.415(1) appeal to PERB can only be filed after the prior grievance steps are exhausted. PERB has found that compliance with the outlined steps is mandatory and that dismissal is proper if an employee fails to exhaust the grievance procedure steps provided by 8A.415(1). *Kuhn and State of Iowa (Comm'n of Veterans Affairs)*, 04-MA-03 at 13. In *Kuhn*, the appealing employee failed to file her appeal with DAS at third step following the second step decision of the appointing authority. In dismissing the appeal, the Board relied on the plain statutory language of subsection 8A.415(1) to conclude that PERB is without authority to adjudicate an 8A.415(1) grievance appeal unless the prior steps of the outlined process are exhausted. *Id.* In the instant case, Sanders also failed to exhaust the available third step of the grievance procedure

prior to filing with PERB. Because no ambiguity exists regarding the mandatory grievance steps established by subsection 8A.415(1), which Sanders has not exhausted, the only conclusion that can be reached under the undisputed facts presented here is that PERB is without jurisdiction to adjudicate the merits of the instant appeal.

Having concluded the State is entitled to dismissal of the instant appeal based on Sanders' failure to exhaust prior grievance steps established by 8A.415(1), it is unnecessary to address the other basis for dismissal urged by the State.

Accordingly, for the reasons stated, I propose the following:

ORDER

The State of Iowa's motion to dismiss is GRANTED and Gary Sanders' state employee grievance appeal is consequently DISMISSED.

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

/s/ Jasmina Sarajlija
Administrative Law Judge

Electronically filed.
Parties served via eFlex.