STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

CHAD UHLENHOPP, Appellant, and STATE OF IOWA (IOWA DEPARTMENT OF TRANSPORTATION, Appellee.	CASE NO. 102329 PROPOSED DECISION AND ORDER

Appellant, Chad Uhlenhopp, filed his state employee grievance appeal on May 18, 2019, with the Public Employment Relations Board (PERB or Board) pursuant to Iowa Code section 8A.415(1) and PERB rule 621—11.2(1). In the appeal, Uhlenhopp alleges the State violated Iowa Administrative Code 11—60.2 and 11—68.6 and DOT policy 230.08 when it failed to provide him overtime equalization.

An evidentiary hearing was held on December 3, 2020. Robin White represented Uhlenhopp, and Anthea Hoth represented the State. The parties submitted post-hearing briefs on January 22, 2021.

Based upon the entirety of the record, and having reviewed and considered the parties' briefs, I conclude Uhlenhopp has not established the State failed to substantially comply with an appropriate Code provision or Department of Administrative Services (DAS) rule as required by Iowa Code section 8A.415(1).

FINDINGS OF FACT

Chad Uhlenhopp works full-time as a highway technician associate (HTA)[1] for the State of Iowa, Department of Transportation (DOT), highway division, at the Latimer garage, located in Franklin County. The Latimer garage is located on the northeast corner of Interstate 35 and Highway 3 and is north of the town of Latimer. The State hired Uhlenhopp as a highway technician associate in 2008. Ron Reichter, a highway maintenance supervisor, supervises the Latimer and Clarion garages. Reichter is Uhlenhopp's supervisor.

An HTA, such as Uhlenhopp, operates equipment and performs physical labor activities in the maintenance of the roadway. A major responsibility of the position is plowing snow. The hours of an HTA vary and include working up to 16 consecutive hours. This position responds to emergencies 24 hours per day with some overnight work. Uhlenhopp has worked almost all winter storms since being hired.

Uhlenhopp has suffered shoulder injuries and has had some work restrictions. In late 2018, the State sent Uhlenhopp home while the State assessed whether Uhlenhopp could perform the duties of the job due to these work restrictions. By February 2019, Uhlenhopp exhausted his bank of sick and vacation leave and began to use medical leave without pay while he waited for the State to return him back to work. Uhlenhopp contends that in February he did ask his supervisor, Reichter, when he was going to return to work. Reichter does not recall this conversation.

[1] A highway technician associate is not the same as a highway technician.

From February 15, 2019, through February 28, 2019, the northeast part of Iowa accumulated a lot of snow during several snowstorms. The other employees at the Latimer garage had the opportunity to work overtime due to the inclement snow events. The employees did not work overtime every day during this period, but worked a significant amount of overtime. An employee in a similar paygrade to Uhlenhopp worked approximately forty-eight hours of overtime in this 9-day period. Uhlenhopp had not yet returned to work although he should have been returned to work by this period of time. Had Uhlenhopp been returned to work, he claims he would have worked all the overtime offered to him during this time period.

On February 27, 2019, Uhlenhopp received a phone call from Mela Nisic with the DOT's Office of Employee Services (OES), which serves as the human resources department for the DOT. Nisic told Uhlenhopp to disregard his insurance paperwork as he was back at work. Uhlenhopp informed Nisic the DOT had not returned him to work. Nisic responded that Uhlenhopp should have been returned to work on February 15, 2019. Five minutes after his phone call with Nisic, Reichter, Uhlenhopp's supervisor, called him to tell him to come back to work. It is unclear from the record why Uhlenhopp had not been called back to work on February 15, when he was cleared to return. Uhlenhopp contends the failure to return him to work may have been because there was a conflict between the Garage Operations Assistant and himself and management did not want him to return until the GOA retired. There is no additional evidence

in the record to support this claim. Uhlenhopp returned to work on Thursday, February 28, 2019.

Upon learning that Uhlenhopp had not been returned to work on February 15, OES determined that Uhlenhopp should be placed on "Other Leave" from February 15 through February 27 rather than medical leave without pay. OES updated the coding on payroll to reflect the use of "other leave" and OES also adjusted Uhlenhopp's vacation and sick leave accruals accordingly. Thus, Uhlenhopp received straight time pay for the nine eight-hour days in which he was able to work, but was not notified to return to work. OES also updated Uhlenhopp's IPERS information accordingly. However, OES did not attempt to remedy any missed overtime pay for overtime hours that Uhlenhopp may have worked during February 15 through February 27.

Under a collective bargaining agreement negotiated between the State and AFSCME Iowa Council 61 prior to 2017, employees in Uhlenhopp's position may have been entitled to overtime equalization in this type of circumstance. The record contains evidence that grievance arbitration awards prior to 2017 did include overtime equalization as part of the award. However, the current collective bargaining agreement does not contain language regarding overtime equalization. The testimony in the record demonstrates that after 2017, overtime compensation is only provided to employees for hours actually worked and overtime equalization is no longer utilized as it was removed from the collective bargaining agreement. Instead, the State relies on the Fair Labor Standards Act

in providing overtime compensation. This Act requires overtime pay for hours "actually worked."

Uhlenhopp filed a grievance requesting to receive overtime equalization for the overtime opportunities he missed in the days he should have been working. DAS denied the grievance at the third step on May 10, 2019. The record does not demonstrate that Uhlenhopp filed any complaint, other than the instant grievance, regarding his workplace environment or the events of February 2019.

Uhlenhopp filed the instant appeal with PERB on May 18, 2019. In his appeal, Uhlenhopp contends the State failed to substantially comply with Iowa Administrative Code 11—60.2 and 11—68.6 and DOT policy 230.08.

CONCLUSIONS OF LAW

Uhlenhopp filed this appeal pursuant to Iowa Code section 8A.415(1), which states, in part:

> 1. *Grievances*
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> *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 days following receipt of the third step grievance.
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> *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. The hearing shall be conducted in accordance with the rules of the public employment relations board and the Iowa administrative procedure Act, chapter 17A. 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.

Pursuant to Iowa Code section 8A.415(1), PERB's decision "shall be based upon a standard of substantial compliance with this subchapter [chapter 8A, subchapter IV] and the rules of the department [of administrative services]." For an employee to prevail in a grievance appeal before PERB under this statutory standard, the employee must establish the State failed to substantially comply with Iowa Code chapter 8A subchapter IV or DAS rules. *Stratton and State (Dep't of Human Servs.)*, 93-MA-13 at 8 (citing a previous version of the statute). Under this statutory framework, the grievant, in this case Uhlenhopp, bears the burden to establish the State failed to substantially comply with the cited statute or rule. *Studer and State (Dep't of Human Servs.)*, 98-MA-12 at 9.

Substantial compliance is undefined by Iowa Code chapter 8A. However, PERB has generally accepted the Iowa Supreme Court's standard for substantial compliance. The Iowa Supreme Court has stated that substantial compliance means:

> [A]ctual compliance in respect to the substance essential to every reasonable objective of the statute. It means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted. Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.

Brooks and State of Iowa (Dep't of Educ.), 15-MA-01 at 7 (citing *Frost and State*, 07-MA-04 at App. 5 (quoting *Brown v. John Deere Waterloo Tractor Works*, 423 N.W.2d 193, 194 (Iowa 1988))). Failure to comply with every word of a statute or

rule is not fatal in every situation under a substantial compliance standard. The Iowa Supreme Court has reiterated that substantial compliance means compliance in respect to essential matters necessary to assure the reasonable objectives of the statute. *Residential and Agric. Advisory Comm., LLC v. Dyersville City Council*, 888 N.W.2d 24, 48 (Iowa 2016). Literal compliance with a rule or statute is not necessary under this standard. *Fulton and State of Iowa*, 10-MA-03 at 9 (Aug. 29, 2011). However, courts have mostly applied substantial compliance to circumstances involving procedural anomalies. *See generally Ortiz and Loyd Roling Construction*, No. 18-0047, 2019 WL 2236111, at *2 (Iowa May 24, 2019). In determining substantial compliance, PERB does not evaluate the effectiveness or fairness of the DAS rule. *Fulton*, 10-MA-03 at 8–9.

In this grievance appeal, Uhlenhopp claims the State failed to substantially comply with Iowa Administrative Code 11—60.2 and 11—68.6, as well as DOT policy 230.08.

Iowa Administrative Code 11—60.2 discusses state employee disciplinary actions. This rule has no applicability to the instant action, as the record contains no evidence about Uhlenhopp receiving discipline. Thus, I find the appellant has failed to demonstrate the State's lack of substantial compliance with Iowa Administrative Code 11—60.2.

Iowa Administrative Code 11—68.2 describes the discrimination complaint process. This rule provides the procedure for filing a complaint, but does not codify any policy regarding discrimination or workplace environment. The record contains no evidence that Uhlenhopp filed a discrimination complaint

under the rule's complaint procedure. This rule has no applicability to the case at hand. Therefore, I find the appellant has failed to establish the State failed to comply with Iowa Administrative Code 11—68.2.

Uhlenhopp also contends the State failed to comply with DOT policy 230.08. This policy pertains to the work environment at the DOT and prohibits certain actions in order to maintain a work environment free of inappropriate or offensive behavior. The policy, in one part, prohibits the "[e]xclusion of a co-worker from the work group so as to deny the employee those resources and communications necessary to accomplish the employee's job duties." The policy also states, "All employees of the DOT, including managers and supervisors, are responsible for maintaining a work environment in which all employees are treated with dignity and respect and in a professional manner."

Uhlenhopp maintains the State excluded him from his work group and thus denied him overtime opportunities. Uhlenhopp also argues management's failure to call him back to work is a violation of this DOT policy. Uhlenhopp, however, has never filed a complaint, other than the instant action, about his exclusion from the work group.

The State's alleged violation of DOT policy 230.08 cannot provide the basis for a successful grievance appeal under Iowa Code subsection 8A.415(1). The statute language clearly states that for an employee to prevail in a grievance appeal, the employee must demonstrate the State's lack of substantial compliance with the cited Iowa Code sections or DAS rules. PERB is without authority to remedy an alleged violation of a State or department policy. *Pierce*

and State of Iowa (Dep't of Human Servs.), 2016 ALJ 100728 at 4–5 and *LaPree and State of Iowa (Commission of Veterans Affairs)*, 01-MA-13, at 3–4 (both finding PERB did not have the legal authority to remedy alleged violations of the State's Violence-Free Workplace policy). The appellant has not shown the substance of DOT policy 230.08 is codified into Iowa Code chapter 8A, subchapter IV or DAS rules. As such, regardless of whether the State violated DOT policy 230.08, Uhlenhopp has failed to demonstrate the State's lack of substantial compliance with Iowa Code chapter 8A, subchapter IV or DAS rules.

At hearing and in the post-hearing brief, Uhlenhopp also alluded to a potential violation of DAS rules related to pay and return from leave as found in Iowa Administrative Code 11—53. Without determining whether this argument is appropriate to raise at this juncture of the proceeding, I still find the Appellant has failed to show the State's lack of substantial compliance with this rule chapter.

This Iowa Administrative Code chapter states in relevant part:

> **53.4(3)** *Total compensation*. An employee shall not receive any pay other than that provided for the discharge of assigned duties, unless employed by the state in another capacity or specifically authorized in the Iowa Code, an Act of the general assembly or these rules.
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> . . . .
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> **53.6(10)** *Return from leave*. If an employee returns from an authorized leave, the employee shall be paid at the same pay rate as prior to the leave, including any pay grade, pay plan, class or general salary increases for which the employee would have been eligible if not on leave, except as provided for in subrules 53. 6(1) and 53.6(2).
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> . . . .

> **53.11(2)** *Eligible job classes*. An employee in a job class designated as overtime eligible shall be paid at a premium rate (one and one-half hours) in accordance with the federal Fair Labor Standards Act.

Uhlenhopp has failed to demonstrate the State's lack of substantial compliance with the above rules or other provisions of Iowa Administrative Code 11—53. Iowa Administrative Code 11—53.6(10) states that employees returning from authorized leave shall be paid at the same pay rate as prior to leave. Uhlenhopp admits he received straight pay for the nine days he missed prior to the State notifying him to return to work. I cannot read that rule so broadly as to interpret it to require the State to provide overtime pay for hours Uhlenhopp did not work. The term "pay rate" referred to in this administrative rule does not address any overtime hours an employee may work, it simply refers to the rate of pay.

Iowa Administrative Code 11—53.4(3), the Fair Labor Standards Act, and the testimony in the record demonstrate an employee is only entitled to overtime compensation for hours actually worked. Uhlenhopp is contesting the pay for additional hours that he did not work. Uhlenhopp has not demonstrated the State failed to substantially comply with Iowa Administrative Code 11—53.6(10) when it failed to provide him overtime equalization for hours he did not actually work when the State finally notified him that he could return to work.

Finally, Uhlenhopp also contends the State failed to comply with the past practice based on a previous collective bargaining agreement to provide overtime equalization. Again, PERB's authority in grievance appeals filed pursuant to Iowa Code subsection 8A.415(1) is limited. The statute is clear and case law has

reinforced that PERB's scope of review in these appeals is limited to determining whether the State failed to substantially comply with Iowa Code section 8A, subchapter IV, or DAS rules. *Jacobs and State of Iowa (Dep't of Nat. Res.)*, 2016 ALJ 100086 at 7–8. Further PERB has no authority to grant a remedy when a department changes a practice, absent a rule prohibiting such change. *Kleis and State of Iowa (Iowa Dep't of Personnel, Dep't of Corrections, and Anamosa State Penitentiary)*, 02-MA-03 at 6–7.

The State, due to a previous collective bargaining agreement that is no longer in effect, used to allow overtime equalization. This past practice cannot form the basis for a successful grievance appeal. PERB's statutory authority in grievance appeals is limited to a determination of whether the State has substantially complied with Iowa Code chapter 8A, subchapter IV, or DAS rules.

For reasons unknown based on this record, Uhlenhopp was not notified of his release to return to work and subsequently missed nine days of work. Had he worked on these days it is possible that Uhlenhopp would have worked a significant amount of overtime and been compensated accordingly. The State did remedy Uhlenhopp's pay, leave, and IPERS for those nine days. Conversely, the State did not remedy Uhlenhopp's pay for the missed overtime opportunities. This loss in overtime compensation may seem unfair, but PERB does not have unfettered authority in grievance appeals to evaluate whether the State acted fairly or to grant a remedy for such unfairness. *See Jacobs,* 2016 ALJ 100086 at 8 (finding PERB can only evaluate the fairness of decisions made by DAS if the applicable statutory provision or rule requires DAS to act fairly in taking such

actions). Under section 8A.415(1), the employee must demonstrate the State failed to substantially comply with Iowa Code chapter 8A, subchapter IV, or DAS rules. Uhlenhopp has made no such showing.

I consequently propose the following:

ORDER

Uhlenhopp's state employee grievance appeal is DISMISSED.

The costs of reporting and of the agency-requested transcript in the amount of $307.25 are assessed against the Appellant, Chad Uhlenhopp, pursuant to Iowa Code section 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).

The proposed decision and order will become PERB's final agency action on the merits of Uhlenhopp'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 merits.

DATED at Des Moines, Iowa this 19th day of February, 2021.

/s/ Amber DeSmet

Administrative Law Judge

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