

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

ROGER HOSCH,)	
Appellant,)	
)	
and)	CASE NO. 102439
)	
STATE OF IOWA (DEPARTMENT OF)	
TRANSPORTATION),)	
Appellee.)	

DECISION AND ORDER

Appellant, Roger Hosch, filed a state employee grievance appeal with the Public Employment Relations Board (PERB or Board) pursuant to Iowa Code section 8A.415(1)(b) and PERB rule 621—11.2. Hosch claims the State failed to substantially comply with Iowa Code section 8A, subchapter IV, or the Department of Administrative Services’ (DAS) administrative rules when, on March 23, 2020, the State required Hosch to self-isolate for 14 days because he had traveled out of state on March 21 and March 22, 2020.

Pursuant to notice, an evidentiary hearing on the merits of the appeal was held before the undersigned administrative law judge on January 12, 2021. Attorney Anthea Hoth represented the State and AFSCME representative Robin White represented Hosch. After Grievant presented his case, the State moved for a judgment as a matter of law, which was denied. Both parties filed post-hearing briefs on February 19, 2021. After considering the evidence and arguments of the parties, I conclude Hosch has not established the State failed to substantially comply with Iowa Code section 8A, subchapter IV, or DAS administrative rules.

FINDINGS OF FACT

Hosch has worked as a Highway Technician Associate (HTA) for the Iowa Department of Transportation (IDOT) since November 9, 1998. For his entire tenure with IDOT, Hosch has worked at the Maintenance Garage in Manchester, Iowa. As an HTA, Hosch is responsible for operating equipment and performing physical labor activities to maintain roadways, roadsides, and bridges as well as performing routine bridge inspections, traffic control and snow/ice removal.

In addition to working as an HTA, Hosch also works a second, non-State job on the weekends driving a milk truck from Manchester, Iowa, to a dairy in Wisconsin. Hosch has worked this second job for many years and IDOT has always been aware of Hosch's second job.

At the hearing, Hosch testified that he often makes two deliveries each weekend, once on Saturday and once on Sunday. Each delivery takes Hosch approximately eight-hours round trip to complete, generally from 10:00 A.M. to 6:00 P.M. Hosch testified that when he arrives at the dairy, he only leaves his truck to hand the receiver his bill of lading papers; he then returns to his truck while it is unloaded and drives back to Manchester.

On Saturday March 21, 2020, and Sunday March 22, 2020, Hosch made his regular deliveries from Manchester, Iowa, to the dairy in Wisconsin. Hosch testified that during both deliveries the receiver at the dairy was the only individual with whom he interacted.

In early-March 2020, the COVID-19 virus began circulating in Iowa communities and, throughout the month, the number of infected Iowans steadily

increased. Prior to March 21, 2020, the Iowa Department of Public Health (IDPH) recommended that all Iowans who had taken a cruise or traveled internationally within the last 14-days should consider themselves exposed to the virus and should isolate themselves from others. Prior to March 21, neither IDPH nor IDOT required individuals who traveled out of state to self-isolate.

However, on Saturday March 21, 2020, due to an increase in positive cases, Governor Reynolds and IDPH issued a press release recommending all Iowans who had recently traveled out of state self-isolate for 14-days to prevent the spread of COVID-19. The next day, IDOT management met to discuss the press release and implement a policy consistent with the Governor's guidance.

Based on the Governor's announcement, the management team determined that all IDOT employees who had traveled out of state for personal or business reasons since Friday March 20, 2020, would need to self-isolate for 14-days. The management team updated the IDOT website, emailed all IDOT managers and support staff to inform them of the new policy, and instructed them to contact their employees before the employees arrived at work Monday morning. Additionally, IDOT's management team advised:

As a reminder, there are multiple options to consider for those who are required to self-isolate. They may telework (if that is possible) or use sick leave, vacation, comp time, leave without pay, or the 80 hours of COVID-19 sick leave (Advanced) if they are out of all other leave...¹

At approximately 3:30 P.M., Sunday, March 22, Hosch's supervisor, Russell Helle, texted Hosch stating, "If you have been out of the state since Friday

¹ State Exhibit 2 p. 1.

March 20th give me a call.” Hosch called Helle shortly thereafter and informed Helle that he was currently in Wisconsin. Pursuant to IDOT’s new policy, Helle instructed Hosch that he needed to self-isolate for 14-days.

Helle told Hosch that he could choose to telework or use sick leave, vacation leave, comp time, or unpaid leave to cover his self-isolation. Helle informed Hosch that if he chose to telework, he could participate in online trainings, which IDOT would credit as hours worked. Helle also provided Hosch a list of the online trainings Hosch could complete from home. At the hearing, Helle testified that there was no other type of telework available for HTAs.

Hosch chose to telework for part of his self-isolation and completed several online trainings. However, Hosch did not do all of the trainings because he encountered computer issues. At the hearing, Hosch acknowledged that he did not inform Helle about the computer problems. Rather, Hosch elected to use vacation leave to cover the remainder of his self-isolation. In total, Hosch self-isolated from March 23, 2020, to April 3, 2020, and, during that time, Hosch completed 35.8-hours of online training—credited as hours worked—and used vacation leave to cover the remaining 44.2-hours, totaling 80-hours.

On April 2, 2020, Hosch filed a non-contract grievance asserting IDOT’s requirement that he self-isolate violated Iowa Code chapter 8A and the Department of Administrative Services’ (DAS) administrative rules because he had no contact with COVID-19 nor was he notified that he could not leave the state prior to performing his second job. Hosch’s grievance was ultimately denied

at the third step of the State's non-contract grievance procedure on May 26, 2020. Hosch subsequently filed a timely appeal with PERB on May 28, 2020.

CONCLUSIONS OF LAW

Hosch filed this appeal pursuant to Iowa Code section 8A.415(1), which provides:

8A.415 Grievances and discipline resolution procedures.

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 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. 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.

Particularly significant in the above-excerpted section is that 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]." Iowa Code § 8A.415(1)(b). As such, PERB's role in section 8A.415(1) cases is limited to determining whether the State's actions were in substantial compliance with Iowa Code chapter 8A, subchapter IV, and

DAS rules. See *McCandless, Eid and Crutchfield & State of Iowa (Dep't of Corrs.)*, 2021 PERB 102483, 102484, 102485 at 5. Although chapter 8A does not define “substantial compliance,” the Board has endorsed the following definition used by the Iowa Supreme Court in other contexts:

“Substantial compliance” with a statute means actual 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.

Frost & State, 2007-MA-04 at 5 (PERB) (quoting *Brown v. John Deere Waterloo Tractor Works*, 423 N.W.2d 193, 194 (Iowa 1988)).

Pursuant to this standard, literal compliance with a rule or statute is not necessary. See *Fulton & State of Iowa*, 2010-MA-03 at 9 (PERB). Moreover, PERB does not evaluate the effectiveness or fairness of an applicable rule. *Id.* Rather, substantial compliance means compliance in respect to essential matters necessary to assure the reasonable objectives of the statute. See *Residential and Agric. Advisory Comm., LLC v. Dyersville City Council*, 888 N.W.2d 24, 48 (Iowa 2016).

Finally, PERB has long held that it does not have the statutory authority to adjudicate a grievance based upon a violation of an alleged non-DAS work rule. See, e.g., *Pierce & State of Iowa (Dep't of Hum. Servs.)*, 2016 ALJ 100728 at 5 (concluding PERB is without jurisdiction to hear and adjudicate the State’s Violence-Free Workplace Policy for executive branch employees); see also *Schaa*

& State of Iowa (Dep't of Hum. Servs.), 01-MA-05 at 4 (ALJ) (concluding PERB is without jurisdiction to hear and adjudicate Department of Human Services work rule). As such, PERB has no authority to grant a remedy when a department changes a practice, absent a rule prohibiting such change. *See Kleis & State of Iowa (Iowa Dep't of Pers., Dep't of Corr., & Anamosa State Penitentiary)*, 2002-MA-03 at 6-7 (ALJ). Accordingly, in the instant case, Hosch bears the burden of establishing IDOT's lack of compliance with a provision of Iowa Code chapter 8A, subchapter IV, or DAS rules. *See McCandless, et al.*, 2021 PERB 102483, 102484, 102485 at 6.

In his post-hearing brief, Hosch asserts IDOT's requirement he self-isolate for 14-days, which Hosch covered in-part with earned vacation leave, failed to substantially comply with Iowa Code section 8A.413 and DAS rules 11—6.15(17A) and 11—63.1(8A) because he was not notified prior to performing his second job that traveling out of state would require his self-isolation. Additionally, Hosch argues IDOT's policy violated several previously established department policies, specifically: IDPH's Protecting and Improving the Health of Iowans;² IDOT's Pandemic Response Plan March 2020;³ and Governor Reynolds' March 21, 2020 press release.⁴ Hosch's arguments will be addressed independently and in succession.

² Grievant's exhibits B and C.

³ Grievant's exhibit D.

⁴ Grievant's exhibit G.

Alleged failure to comply with Iowa Code section 8A.413

Although not explicitly cited in his brief, Hosch appears to contend IDOT's requirement that he self-isolate, for which he used vacation leave to cover part of the time, failed to substantially comply with two subsections of Iowa Code section 8A.413. First, Hosch argues the use of vacation leave to cover part of his self-isolation violated Iowa Code subsection 8A.413(21)(b). Second, Hosch contends that because he was not exposed to COVID-19 in Wisconsin, and was thus fit to discharge his job duties, IDOT's requirement that he self-isolate violated Iowa Code subsection 8A.413(4). For the reasons discussed below, I disagree.

In his first allegation, Hosch asserts IDOT failed to substantially comply with Iowa Code subsection 8A.413(21)(b) when IDOT approved his use of vacation leave to cover part of his self-isolation. Subsection 8A.413(21)(b) states, "[DAS] rules shall provide...Annual sick leave and vacation time [] be granted in accordance with section 70A.1." Accordingly, to substantially comply with subsection 8A.413(21)(b), the State must adhere to the provisions of section 70A.1. *See McCandless, et al.*, 2021 PERB 102483, 102484, 102485 at 8. Iowa Code subsection 70A.1(2)(b) provides, in relevant part:

The vacations shall be granted at the discretion and convenience of the head of the department, agency, or commission, except that an employee shall not be granted vacation in excess of the amount earned by the employee....

Thus, section 70A.1 provides agencies broad discretion to make rules and determinations concerning employees' vacation leave. Moreover, subsection

70A.1(2)(b) contains no clear requirements or limitations on agencies' exercise of this authority. As such, nothing in subsection 70A.1(2)(b) prohibited IDOT from granting Hosch's vacation leave to cover part of his period of self-isolation. Therefore, as subsection 8A.413(21)(b) requires IDOT to grant vacation leave in accordance with section 70A.1, I conclude IDOT substantially complied with Iowa Code subsection 8A.413(21)(b).

Turning to Hosch's second allegation, Hosch asserts that because he was not exposed to COVID-19 in Wisconsin, and was thus fit to discharge his duties as an HTA, IDOT violated Iowa Code subsection 8A.413(4) when it required him to self-isolate for 14-days. Iowa Code subsection 8A.413(4) states, in relevant part:

[DAS] rules shall provide...

4. For such examinations to determine the relative fitness of *applicants for employment*.
 - a. Such examinations shall be practical in character and shall relate to such matters as will fairly assess the ability of *the applicant* to discharge the duties of the position to which appointment is sought...

(Emphasis added).

As the language "applicants for employment" makes clear, Iowa Code subsection 8A.413(4) empowers DAS to establish rules governing agencies' use of examinations when hiring. Therefore, while subsection 8A.413(4) does reference an individual's ability "to discharge the duties of the position," it does so in the context of agencies' authority to use examinations to assess the fitness of applicants when hiring. In the instant case, IDOT was not engaged in the

hiring process. As such, Iowa Code subsection 8A.413(4) has no applicability to this case. Consequently, Hosch has failed to demonstrate IDOT's lack of substantial compliance with Iowa Code section 8A.413.

Alleged failure to comply with DAS rules

Although not articulated in precisely this manner, Hosch asserts IDOT's implementation and enforcement of its self-isolation policy failed to substantially comply with two DAS administrative rules. First, Hosch argues IDOT improperly applied its policy retroactively to March 20, 2020, in violation of DAS rule 11—6.15(17A). Additionally and alternatively, Hosch asserts that IDOT's retroactive application of the policy failed to provide him notice that his out-of-state travel would require his self-isolation in violation of DAS rule 11—63.1(8A). For the reasons discussed below, the undersigned disagrees.

As to Hosch's first allegation, Hosch asserts IDOT's retroactive application of its policy violated DAS rule 11—6.15(17A). DAS rule 6.15 is part of Chapter 6 of DAS's administrative rules titled "Agency Procedure for Rule Making." DAS rule 6.15 states, in relevant part:

11—6.15(17A) Effectiveness of rules prior to publication.

6.15(1) *Grounds.* The department may make a rule effective after its filing at any stated time prior to 35 days after its indexing and publication in the Iowa Administrative Bulletin if it finds that a statute so provides, the rule confers a benefit or removes a restriction on some segment of the public, or that the effective date of the rule is necessary to avoid imminent peril to the public health, safety, or welfare. The department shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

6.15(2) Special notice. When the department makes a rule effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)“b”(3), the department shall employ all reasonable efforts to make its contents known to the persons who may be affected by that rule prior to the rule’s indexing and publication...

Although chapter 6 of DAS’ rules does not itself contain a definitions section, other chapters of DAS’ rules consistently define the term “the department” as meaning the Department of Administrative Services. See Iowa Admin. Code rs. 11—4.1(8A,22), 11—20.2(81GA,ch90), 11—40.1(8A), and 11—50.1(8A). Thus, while DAS rule 6.15 sets forth procedures for making rules effective prior to indexing and publication, these procedures apply only to rules adopted *by* DAS. In this case, the policy at issue was implemented by IDOT, not DAS.

Moreover, DAS rule 6.15 derives its authority from Iowa Code chapter 17A, which I consulted for clarification. Iowa Code chapter 17A explicitly excludes from its definition of “Rule,” “...A statement concerning only the internal management of an agency and which does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof.” Iowa Code § 17A.2(11)(a). In the instant case, IDOT did not adopt a formal rule and the policy applied only to IDOT employees. As such, IDOT’s policy was not a “rule” as defined by Iowa Code chapter 17A. Therefore, as IDOT’s policy was not a DAS rule, DAS rule 6.15 has no applicability to this case and Hosch has failed to demonstrate IDOT’s lack of substantial compliance with DAS rule 11—6.15(17A).

Turning to Hosch’s second allegation, Hosch asserts that IDOT’s retroactive application of the policy failed to provide him notice that his out-of-

state travel would require his self-isolation in violation of DAS rule 11—63.1(8A).

DAS rule 63.1 states:

11—63.1(8A) Attendance. Appointing authorities shall establish the working schedules, regulations, and required hours of work for employees under their direction. All regulations and schedules shall be made known to the affected employees by appointing authorities. All absences of probationary and permanent employees shall be charged to one of the leave categories provided for in this chapter.

On its face, DAS rule 63.1 simply requires agencies to establish work regulations and schedules and to make those regulations and schedules known to their employees. Nothing in this rule necessarily prohibits agencies from changing work rules or schedules on short notice.

Further, even assuming *arguendo* that DAS rule 63.1's requirement that "All regulations...shall be made known to the affected employees..." prohibits agencies from retroactively enforcing newly implemented regulations, in the instant case, IDOT informed Hosch of its policy at 3:30 P.M. Sunday, March 21 while Hosch was still in Wisconsin. Thus, at the time Hosch was made aware of the policy, he was not in compliance, regardless whether IDOT also applied it retroactively.

However, the clearest authority for IDOT's actions stems from the purpose of its policy: to mitigate the spread of a highly contagious virus during a public health emergency. To this end, IDOT's policy was a valid exercise of its authority under DAS rule 11—63.15(8A), which states, in relevant part:

11—63.15(8A) Absences due to emergency conditions. When a proper management authority closes a state office or building or directs employees to vacate a state office or building premises, employees may elect to use compensatory leave, vacation, or leave without pay to cover the absence. Employees may, with the approval

of the appointing authority, elect to work their scheduled hours even though the state office or building is closed to the general public. Employees may, with the approval of the appointing authority, be permitted to make up lost time within the same workweek.

Thus, during emergency conditions, DAS rule 63.15 authorizes agencies to “direct employees to vacate...building premises.” In these situations, employees may, with approval, work their scheduled hours remotely or elect to use leave to cover their absence.

In the instant case, pursuant to the Governor’s guidance, IDOT implemented a policy requiring all employees who recently traveled out of state to self-isolate in order to mitigate the spread of COVID-19. Thus, as authorized by rule 63.15, IDOT directed certain employees to remain home due to emergency conditions. Further, as required by rule 63.15, IDOT provided Hosch the option to work his scheduled hours remotely or to use compensatory leave, vacation, or leave without pay to cover his absence. Under these circumstances, I conclude IDOT substantially complied with DAS rule 63.15 when it implemented its policy and required Hosch to self-isolate for 14-days. Consequently, Hosch has failed to demonstrate IDOT’s lack of substantial compliance with DAS rules 11—63.1(8A) or 11—63.15(8A).

Alleged violation of previously established department policies

Hosch’s final contention is that IDOT’s self-isolation policy was unfair and inconsistent with several other previously established department policies. In the instant case, these claims are not grounds upon which PERB can grant relief.

As discussed above, PERB's authority in grievance appeals is limited to determining whether the State failed to substantially comply with Iowa Code section 8A, subchapter IV, or DAS rules. As such, PERB has no authority to grant a remedy when a department changes a practice, absent a rule prohibiting such change. *See McCandless, et al.*, 2021 PERB 102483, 102484, 102485 at 9; *See also Kleis*, 02-MA-03 at 6-7 (ALJ). Similarly, it is beyond PERB's authority in grievance appeals to evaluate the fairness of the State's decisions absent a statutory provision or administrative rule requiring the State to be fair in taking such action. *See McCandless, et al.*, 2021 PERB 102483, 102484, 102485 at 9; *see also Fulton*, 10-MA-03 at 9 (PERB); *Brooks & State of Iowa (Dep't of Educ.)*, 15-MA-01 at 8-11 (PERB); *Jacobs & State of Iowa (Dep't of Nat. Res.)*, 2016 ALJ 100086 at 8. In this case, Hosch has cited no such statutory authority or administrative rules. Consequently, Hosch has failed to demonstrate IDOT's lack of substantial compliance with Iowa Code chapter 8A, subchapter IV, or DAS rules. Accordingly, I propose the following:

ORDER


Hosch's state employee grievance appeal is DISMISSED.

The costs of reporting and of the agency-requested transcript in the amount of \$220.25 are assessed against the Appellant, Roger Hosch, 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 11.9(3).

This proposed decision and order will become PERB's final agency action pursuant to PERB rule 621—9.1 unless, within 20 days of the date below, a

party aggrieved by the proposed decision files an appeal to the Board or the Board determines to review the proposed decision on its own motion.

DATED at Des Moines, Iowa this 24th day of March, 2022.



Patrick B. Thomas
Administrative Law Judge

Electronically filed.
Parties served via eFlex.