

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

BRIAN SUTHERS, Appellant,)	CASE NO. 102472
and)	
STATE OF IOWA (DEPARTMENT OF CORRECTIONS), Appellee.)	PROPOSED DECISION AND ORDER

Appellant, Brian Suthers, filed his state employee grievance appeal on October 1, 2020, 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, Suthers alleges the State failed to substantially comply with Iowa Code 8A.402, Iowa Administrative Code 11-63 and the Department of Corrections' COVID-19 Master Action Plan (MAP), when the State required Suthers to quarantine and use sick leave due to his contact with a fellow correctional officer that was presumed positive for COVID-19.

The appeal was originally set for an evidentiary hearing. However, the parties requested to stipulate to material facts filed as Appellant exhibits A through O and State exhibits 1 through 4.¹ In this stipulation of facts, the parties agreed the question at issue is whether the State failed to substantially comply with Iowa Administrative Code 11—63.3. The parties submitted briefs on March 18, 2022, and the undersigned administrative law judge held oral arguments on

¹ The Appellant exhibits A through O (actually listed as Union exhibits) were submitted twice in PERB's electronic document management system.

March 30, 2022. Robin White represented Suthers and Andrew Hayes represented the State.

Based upon the entirety of the record, and having reviewed and considered the parties' briefs, I conclude Suthers has not established the State failed to substantially comply with Iowa Administrative Code 11—63.3.

1. FINDINGS OF FACT

Brian Suthers works at Anamosa State Penitentiary (ASP) as a correctional officer (CO) for the State of Iowa, Department of Corrections (DOC).

1.1 DOC COVID-19 Response Prior to August 5, 2020

To control the spread of the highly transmissible virus, COVID-19, the DOC instituted a Master Action Plan (MAP or Plan) at the correctional facilities.² In the MAP, the DOC stated that it based the plan on current guidance from the Centers for Disease Control (CDC) and adapted it to a correctional setting. The DOC further explains that due to changing CDC guidelines, the DOC would change and update the plan accordingly.³

The MAP defined “workplace exposure” as an employee in close contact with a person who has tested positive for COVID-19 while not wearing qualified personal protective equipment (PPE). The Plan provided that an exposed employee should quarantine at home for 14 days of the most recent exposure.

As of July 17, 2020, all ASP staff were required to wear face shields and procedural masks. ASP instructed employees that they could remove PPE when

² ASP did not have a substantial outbreak of COVID-19 until October or November of 2020.

³ The State issued the most recent update of the MAP relevant to this appeal on July 29, 2020.

they were able to socially distance. DOC and ASP management instructed all ASP staff multiple times in late July 2020 to wear PPE and to socially distance.

1.2 Incident during Week of August 3 through August 7, 2020

The incident at issue in this grievance arose the week of August 3 through August 7. Suthers worked on Monday, August 3 with fellow correctional officer MK. Suthers also worked August 4 and then worked again on August 5 with MK. While at work on August 5, Suthers and three other COs sat at a table with MK during mealtime.⁴ As the lunchroom area only had one table and ASP did not stagger the employees' meal times, the employees sat at the same lunch table and did not socially distance during the mealtime. Additionally, the employees had to remove their PPE for the duration of the meal so they could eat. The meal lasted roughly ten to fifteen minutes.

The evening of August 5, MK called an ASP correctional supervisor to report that he would not be at work as his wife had tested positive for COVID-19 that day, and MK reported he had a scratchy throat and runny nose. After receiving this call, ASP management traced MK's movements in the facility and identified employees who had been in close proximity with MK and might be impacted by MK's exposure and presumed positive COVID-19 status. ASP determined several other employees sat in close proximity to MK at mealtime on August 3 and August 5. Suthers received a phone call from ASP management in which he confirmed he had eaten with MK on August 5 and had worked the entire 8-hour shift with MK on August 3 and August 5.

⁴ Suthers noted that ASP added an additional table in the lunch area after this incident.

ASP determined the employees that ate with MK at mealtime without PPE and without socially distancing, needed to quarantine at least until MK's test results were available due to MK's exposure to COVID-19 and his symptoms. Fearful of the spread of COVID-19, ASP had Suthers and the other employees at the lunch table with MK utilize sick leave for any resulting absences until the DOC could clear the employees to return to duty. When ASP contacted Suthers to notify him the State would not allow him to report to work, ASP management told Suthers he would be off work until contacted by human resources for COVID-19 testing.

Suthers was scheduled to work both August 6 and August 7. ASP placed Suthers on quarantine for his scheduled shift on August 6, and required him to use sick leave to cover the absence. On August 7, ASP called Suthers to let him know MK's results for COVID-19 were negative and Suthers could return to work for his August 7 shift or he could remain on sick leave and return on his next scheduled shift of August 10. Suthers opted to remain on leave for August 7 and returned on his next scheduled shift.

1.3 Procedural History

Suthers grieved his forced quarantine and required use of sick leave at Step 1 on August 20. He submitted his grievance at Step 2 on August 25. He submitted his grievance at Step 3 citing Iowa Code sections 8A.402, 8A.415, Iowa Administrative Code 11--61 and 11--63, and the MAP updated 7/29/2020 as relevant legal authority. Suthers also noted that he believed he received unfair treatment as there was an identical example in the maintenance department and

the DOC sent those employees home on administrative leave. The State denied Suthers' grievance at Step 3 on September 25, 2020.

Suthers filed his 8A.415(1) grievance with PERB on October 1, 2020. The parties submitted briefs on March 18, 2022, and presented oral arguments on March 30, 2022.

2. SUMMARY OF ARGUMENT AND ISSUE

The dispute in this case is whether the State failed to substantially comply with Iowa Code chapter 8A, subpart IV or DAS rule, specifically Iowa Administrative Code 11—63.3, when the DOC required Suthers to quarantine on August 6, 2020, until ASP determined that Suthers could safely report to duty after his potential exposure to COVID-19. Suthers argues the State did not have the authority to force him to quarantine, as he did not meet the definition for workplace exposure to COVID-19 as detailed in the DOC's existing COVID policy. Suthers claims he should not have been on leave at all on August 6, 2020. Suthers' cites Iowa Administrative Code 11—63.3 as the relevant legal authority.

The State argues it appropriately reacted to the situation, and did not fail to comply with the applicable statute or DAS rules.

3. CONCLUSIONS OF LAW

3.1 General 8A.415(1) standard

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

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 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.

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 Suthers, bears the burden to establish the State failed to substantially comply with the cited statute or rule. *McCandless and State of Iowa (Dep't of Corrections)*, 2021 PERB 102483, 102484, & 102485 at 6.

3.2 DOC Required Suthers to Quarantine

Suthers main contention in this case concerns whether the State had the authority, given the circumstances, to quarantine him, especially considering the DOC's existing COVID plan at the time. Suthers contends the State did not

follow its own COVID procedures since the DOC's Plan defined "workplace exposure" as being in close contact with a person that tested positive for COVID while not wearing the qualified PPE. In this case, Suthers was not exposed to anyone that had tested positive for COVID, as MK was presumed positive, but did not have a positive COVID-19 test result. Instead, Suthers had a potential workplace exposure that the appellant describes as an unlikely exposure. As he did not experience a workplace exposure to COVID-19 under the State's own COVID plan, Suthers claims the State did not have the authority to require his quarantine.

When making this argument, Suthers does not cite to an applicable DAS rule or statutory provision in Iowa Code chapter 8A, subpart IV. Instead he contends the DOC did not follow its' own COVID Master Action Plan. Notably under Iowa Code section 8A.415(1), PERB must base its decisions on the State's compliance with a DAS rule or the specified statutory provisions. The State's failure to follow an existing policy cannot form the basis for an appellant's grievance. *Pierce and State of Iowa (Dep't of Human Servs.)*, 2016 ALJ 100728 at 5 (concluding a grievant must establish the State's lack of substantial compliance with the specified Code or DAS rule rather than a department or State policy). Similarly, PERB lacks the 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 an action. *McCandless*, 2021 PERB 102483, 102484, & 102485 at 9. Even if the record supports Suthers' contention that the State failed to follow the DOC's MAP, PERB

lacks the statutory authority to remedy that violation. The Appellant has failed to cite the specific Code sections or DAS rules as required by Iowa Code section 8A.415(1) that demonstrate the State lacked the authority to quarantine Suthers. As such, the Appellant has not established the State's failure to substantially comply with applicable statute or DAS rule when it quarantined Suthers on August 6, 2020.

3.3 DOC Required Suthers to Use Sick Leave

As an appellant needs to argue the State failed to comply with a specific statutory provision or a DAS rule pursuant to Iowa Code section 8A.415(1), Suthers argues the State failed to substantially comply with Iowa Administrative Code 11—63.3, the DAS sick leave rule provision.

Iowa Administrative Code 11—63.3, relating to sick leave, states in relevant part:

63.3(1) Accrued sick leave may be used during a period when an employee is unable to work because of medically related disabilities; for physical or mental illness; medical, dental or optical examination, surgery or treatment; or when performance of assigned duties would jeopardize the employee's health or recovery.

Iowa Code section 8A.413 requires DAS to adopt a variety of rules, including rules regarding sick leave. Thus, DAS promulgated DAS sick leave rule Iowa Administrative Code 11—63.3 in compliance with Iowa Code section 8A.413, and the rule derives its authority from Iowa Code 8A.413. The relevant part of Iowa Code section 8A.413 states: "Annual sick leave and vacation time shall be granted in accordance with subsection 70A.1." Iowa Code § 8A.413(21)(b). Thus, in promulgating Iowa Administrative Code 11—63.3, the

Iowa Code requires DAS to incorporate the provisions of Iowa Code section 70A.1.

Similar to a previous PERB case involving leave use due to COVID-19, the parties in this case focus on whether the State substantially complied with the provisions of Iowa Code section 70A.1, as Iowa Administrative Code 11—63.3, necessarily follows this statutory provision. *See McCandless*, 2021 PERB 102483, 102484, & 102485 at 8. Suthers essentially argues the State failed to substantially comply with Iowa Code subsection 70A.1(5), and both parties allude to this provision as the primary provision at issue in this case. *See also McCandless*, 2021 PERB 102483, 102484, & 102485 at 8 (discussing that substantial compliance with DAS rule 11—63.3 necessarily requires the State to substantially comply with Iowa Code section 70A.1(5)).

The relevant provisions of Iowa Code section 70A.1 state:

70A.1 Salaries—payment—vacations—sick leave—education leave.

. . . .

5. Sick leave shall not accrue during any period of absence without pay. Employees may use accrued sick leave for physical or mental personal illness, bodily injury, medically related disabilities, including disabilities resulting from pregnancy and childbirth, or contagious disease, which result in any of the following:

- a. The employee's confinement is required.
- b. The employee is rendered unable to perform assigned duties.
- c. The performance of assigned duties would jeopardize the employee's health or recovery.

Suthers claims that under the sick leave provisions, his confinement was not required especially when considering the DOC's MAP, the Iowa Department of Public Health rules relating to contagious diseases, isolation, and quarantine,

and the CDC guidelines. Therefore, Suthers claims the State should not have forced him to use sick leave. The State contends Suthers' confinement was required due to Suthers' exposure to an employee that was presumed positive for COVID-19. The State further argues that Suthers' potential workplace exposure to COVID-19 rendered him unable to perform his assigned duties.

The statute, Iowa Code section 70A.1(5), is silent on who determines whether confinement is required. The DAS rule regarding sick leave does not clarify the statute, as it never discusses requiring confinement due to a contagious disease. In this case, ASP determined Suthers' confinement was required due to his workplace exposure to MK, who was presumed positive for COVID-19. Suthers argues the DOC's MAP defines workplace exposure that would lead to quarantine, and Suthers' circumstances did not meet the definition of "workplace exposure" so confinement was not required. Suthers further notes that Iowa Department of Public Health rules would allow for the least restrictive quarantine necessary and would suggest testing was needed to verify if quarantine was appropriate. See Iowa Administrative Code 641—1.8 & 1.9.

Interpreting Iowa Code section 70A.1(5) to ascertain whether confinement was required and who determines whether confinement was required is unnecessary under this set of facts as I conclude the State substantially complied with Iowa Code section 70A.1(5).

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); *McCandless*, 2021 PERB 102483, 102484, & 102485 at 5. Literal compliance with a rule or a statute is not necessary. *McCandless*, 2021 PERB 102483, 102484, & 102485 at 5. Substantial compliance means the State complies with the essential matters necessary to assure the reasonable objectives of the statute. *Id.*

The rule and statute in this case involve an employee's use of sick leave. The statute and rule allow an employee to use accrued sick leave benefits. In this case, ASP allowed Suthers to utilize his accrued sick leave benefits, substantially complying with the purpose of the sick leave statute and rule.

This case involves a unique situation, in which ASP had an employee they presumed to be positive for COVID-19 due to his exposure to the highly contagious disease and his symptoms. Several other employees, including Suthers, were exposed to this presumed positive employee.⁵ ASP management told those employees to stay home while the facility arranged COVID tests for them and found out more information from the presumed positive employee. As soon as ASP discovered MK did not have COVID-19, ASP told the employees they could return to work. This resulted in Suthers missing only one day of work.

Under Iowa Code section 70A.1(5), an employee is allowed to use sick leave in a circumstance where a contagious disease either requires the employee's confinement or renders the employee unable to perform assigned duties. Even if Suthers confinement was not required and he could perform his assigned duties, the circumstances are very similar to the listed statutory reasons for which an employee can use earned sick leave.

As the State allowed Suthers to use his accrued sick leave in a situation similar to what is listed in Iowa Code section 70A.1(5), I conclude the State's actions assured the reasonable objectives of this statute. The statute is set up to allow an employee to use earned sick leave under certain circumstances. The unique and narrow circumstances at issue in this case are so similar to the listed rationale to allow an employee to use sick leave that the State allowed Suthers

⁵ Throughout various exhibits, Suthers and the State discuss Suthers' fault in this potential COVID exposure as he was unmasked and was not socially distanced during lunch. Suthers' alleged fault in the potential exposure has no bearing in this case. Further, given the facts in the record I could not conclude Suthers is actually at fault for this potential exposure. There were various circumstances beyond his control such as his break time and the location and setup of the break area.

to use his earned sick leave. Suthers has not shown the State failed to substantially comply with the DAS sick leave rule provision when it allowed him to use sick leave in a circumstance similar to those specified in Iowa Code section 70A.1(5), thereby complying with the purpose of the sick leave statute and rule.

I consequently propose the following:

ORDER

Suthers' state employee grievance appeal is DISMISSED.

The proposed decision and order will become PERB's final agency action on the merits of Suthers' 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 20th day of May, 2022.

/s/ Amber DeSmet

Administrative Law Judge

Filed electronically.
Parties served via eFlex.