

STATE OF IOWA  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

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| ILO JON ALLEN,                | ) | PUBLIC EMPLOYMENT |
| Appellant,                    | ) | RELATIONS BOARD   |
|                               | ) |                   |
| and                           | ) |                   |
|                               | ) | CASE NO. 13-MA-05 |
| STATE OF IOWA (DEPARTMENT OF, | ) |                   |
| TRANSPORTATION, DEPARTMENT OF | ) |                   |
| ADMINISTRATIVE SERVICES),     | ) |                   |
| Appellee.                     | ) |                   |

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PROPOSED DECISION AND ORDER

Appellant Ilo Jon Allen (Allen) filed a state employee disciplinary action appeal with the Public Employment Relations Board (PER Board) on December 3, 2012. Appellant Allen alleged his employer imposed a five day suspension from work on August 6, 2012, without just cause within the meaning of Iowa Code section 8A.415 (2). The employer is the State of Iowa, the Department of Transportation, and the Department of Administrative Services (collectively DOT). The DOT contends Allen violated work rules and regulations in using work computers for non-work business as well as sending and forwarding inappropriate e-mails to a subordinate and others.

This administrative law judge (ALJ) was assigned as hearing officer on January 8, 2013. Pursuant to Iowa Code sections 8A.415 and 20.1(2), and 17A.12, this ALJ held a contested case hearing on January 31, 2013. Mr. Allen represented himself at the hearing; Mr. John Crupi represented the DOT. The DOT filed a post-hearing brief on February 13, 2012. Allen chose not file a post-hearing brief.

After a review of the pleadings, the evidence, the arguments and the law, this ALJ rules as follows:

#### FINDINGS OF FACT

For administrative purposes, the State of Iowa divides the Iowa Department of Transportation (DOT) into six statewide districts. District Three includes the nineteen northwest Iowa counties and is supervised by District Engineer Tony Lazarowicz (Lazarowicz). For the past two years, Todd Huju (Huju) has served as the District Three maintenance manager. Huju reports to Lazarowicz. Huju, in turn, supervises eight highway maintenance supervisors, one of whom is Allen. Allen has served as a highway maintenance supervisor since August 1986. Allen began work with the DOT in November 1979.

This matter arose out of a separate investigation by DOT employee relations officer, Dana McKenna (McKenna) while McKenna was looking into another e-mail complaint. McKenna traced the source of the inappropriate e-mail back to Allen's personal computer. She then found more than fifty e-mails Allen had sent over a three month period. Allen's numerous e-mails contained inappropriate pictures, comments, and jokes that made fun of and disparaged religious groups, homosexuals, political parties, the President, blondes, and the elderly. One Allen e-mail included seventy links to websites which streamed music videos. Another Allen e-mail contained video attachments.

Arguably the most inappropriate Allen e-mail was entitled "A Matter of Perspective—Keep Your Mind Out of the Gutter." Allen sent this e-mail to a female subordinate, Leana Shull (Shull). Allen did not send it to her personal

e-mail account; instead, he sent it to her work e-mail account. The e-mail contained colored photographs which at first glance appear to be close-ups of male and female private parts. In fact, each photograph is a cleverly cropped or staged photograph of other objects designed to create the impression of nudity.

For example, the first photograph is a cropped, black and white silhouette of a tree which looks exactly like a hair covered vagina. Below the photograph, in large letters are the words: **“CALM DOWN!”** And in a much smaller font are the words: **“It’s just a tree.”**<sup>1</sup> If one looks hard at the photograph, one can eventually see a tree, but until that recognition occurs, one only sees a hair covered vagina. This was one of twelve colored photographs of a similar sexual nature.

In mid-July 2012, McKenna as part of her investigation, showed the e-mails to Huju, Allen’s supervisor. Huju immediately placed Allen on paid suspension pending a full investigation.<sup>2</sup> McKenna stated that the immediate suspension was warranted because of the nudity (or perceived nudity) contained in the e-mail with the twelve colored photographs. Nudity contained in an e-mail, she explained, was a DOT terminable offense. McKenna also testified that while the overall number of e-mails, jokes, attachments, and music files were of serious concern to the DOT, the e-mail containing the nude-

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<sup>1</sup> This ALJ has not “pasted” these inappropriate photos into this written opinion. The photos, along with the other Allen e-mails, are included in the PER Board file, which is a public record and marked DOT Exhibit 1.

<sup>2</sup> The DOT suspension letter, DOT Exhibit 2, was dated July 18, 2012, and is detailed on pp. 5-6 of this opinion.

like photos was the main concern. What is more, Allen's subordinate, Shull, had forwarded the nude-like photographs to other DOT employees with this comment: "I (Shull) wasn't sure if I should send these on, but Jon (Allen) says it's the way you look at them. So here goes."<sup>3</sup>

The DOT continued its investigation by conducting an August 2, 2012, recorded interview with Allen.<sup>4</sup> With Lazarowicz also present, Huju asked Allen several questions about the e-mails and the DOT's internet policies. In his interview Allen admitted he sent the e-mails to several people, including Shull at her DOT e-mail address. Allen also admitted that the e-mails "probably" could be viewed as pornography, but he thought Shull would find them to be humorous. In Allen's words, "I didn't see anything wrong with it. It's a perception thing." Allen stated he meant it as a joke, to be funny. Allen also admitted he was aware of the various DOT internet policies. These include:

- a. Using work computers for only authorized purposes;<sup>5</sup>
- b. Not overloading the DOT server with excessive data, including non-business chatter such as jokes or video or audio files;<sup>6</sup>
- c. Not sending materials involving: obscenity, pornography, or defamation;<sup>7</sup>
- d. Sending materials with language which is sexually oriented or embarrassing.<sup>8</sup>

Soon after McKenna completed her investigation, the DOT held a meeting to determine how to proceed. The decision makers included: Lazarowicz,

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<sup>3</sup> DOT Exhibit 1.

<sup>4</sup> The DOT played the recorded interview at the hearing. A copy of the recording is also in the file.

<sup>5</sup> DOT Policy #030.02 (I) (A)(1)(a) dated Oct 1, 2012 contained in DOT Exhibit 5.

<sup>6</sup> DOT Policy #030.02 (I) (A)(2)(h) dated Oct. 1, 2012 contained in DOT Exhibit 5.

<sup>7</sup> DOT Policy #030.02, 230.09 II (D)(3) revised Mar. 16, 2011 contained in DOT Exhibit 6.

<sup>8</sup> *Id.*

Huju, McKenna, and Todd Sadler, head of the DOT's Office of Employee Services. McKenna testified that the group first reviewed Allen's recorded interview. They then looked at all of Allen's e-mails and compared them to other DOT discipline cases. McKenna stated that the DOT has had prior cases of workplace e-mails containing nudity and those employees were fired. That said, it was decided that because the photographs were not actually nude forms, but nude-like, that Allen's conduct should not be a terminable offense.

On the other hand, another consideration was that Allen, as a supervisor, is held to a higher standard of responsibility both in setting an example and enforcing work place policies. The DOT concluded Allen had failed with regard to both duties. The group then considered disciplining Allen with a "final warning." However, because of Allen's work performance and his thirty-four years of service, the consensus was that a five day suspension was appropriate under the circumstances.

The DOT issued Allen his suspension letter on August 6, 2012. It provided:

Jon:

This letter will serve as notice of a 5 day suspension. Because your classification is exempt your suspension will be with pay and is considered a paper suspension. This action is being taken as a result of your violation of the following Iowa Department of Transportation Work Rules.

- I. Work Performance, 1. Insubordination, disobedience, failure or refusal to follow the written or oral instructions of supervisory authority, or to carry out work assignments.

This rule was violated when you failed to follow DOT PPM 030.02 Computer Workstations, when you forwarded non-work related e-mails to a subordinate employee's DOT e-mail account.

II. Work Performance, 2. Neglecting job duties and responsibilities.

This rule was violated when you gave an employee permission to violate DOT PPM 030.02 *Computer Workstations* and DOT PPM 030.09 *Internet and Intranet Services*. Further violation of these work rules or any other work rule may result in more severe disciplinary action, up to and including termination.<sup>9</sup>

At the hearing, both Huju and McKenna testified on behalf of the DOT. The DOT also introduced copies of the applicable workplace policies, along with the *State of Iowa Handbook*. It provides, in pertinent part:

The use of state-provided Internet service must be for state government-related activities and not for personal business, for-profit activities, commercial advertising, entertainment, or other use that interferes with an employee's productivity or reflects poorly on state government. . . . Misuse of the Internet . . . . could be grounds for disciplinary action, up to, and including discharge.<sup>10</sup>

Attached to the copy of the *State of Iowa Handbook* was a written acknowledgement by Allen that he had read the handbook and had been given the opportunity to ask any questions about the handbook or the policies contained within it. Allen signed and dated this acknowledgement with his computer signature on March 25, 2011.

Allen began his testimony by reading from a prepared statement.<sup>11</sup> Up until his July 2012 suspension, Allen stated he had an unblemished work

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<sup>9</sup> DOT State Exhibit 4.

<sup>10</sup> DOT State Exhibit 8.

<sup>11</sup> A copy of the statement is contained in the file.

record; he had received several commendations for his service, and had positive work evaluations. Allen described himself as a “dedicated” DOT employee. Allen then related how difficult and stressful the entire investigation had been on himself and on his wife. In Allen’s view, “This was no way to treat a human being let alone a dedicated long term employee.”

As to the merits of the disciplinary action, Allen again admitted that, yes, he was aware of the internet policies but stated that he had “never actually reviewed them.” Allen “was not aware that jokes were not allowed.” He did, however, know that “porn sites were inappropriate” and he “did not have any intention of ever going to [those] sites.” Allen stated he had exchanged “similar type e-mails” with his previous supervisor without a problem. Later in his testimony, Allen narrowed his argument: he knew pornography was inappropriate but didn’t think what he had sent had crossed the line of an inappropriate e-mail. Allen argued the DOT had not really given him notice about where the line of inappropriateness had been drawn.

Finally, Allen stated that in his view, the five day suspension was excessive and that, instead, he should have been given just a verbal warning. In support of this conclusion he offered a notarized, but unsworn written statement signed by his subordinate, Shull, who had received the e-mail from Allen and then forwarded it to others after checking with Allen. Shull works as Allen’s Garage Operations Assistant (GAO). Shull stated she had also been sent home on July 18, 2012, pending her investigation for forwarding the nude-like e-mail. She was returned to work on August 3, 2012 with a written

reprimand. Shull claimed that as a twenty year employee with a clean DOT employment record, she thought she just should have received a verbal warning, rather than initially being put on paid suspension and then later receiving a written reprimand.

Similar to Allen's comments, Shull "didn't think sending jokes was a problem." Shull claimed that she knew of other DOT employees who had sent jokes to her and only one of those employees had been disciplined. It is not clear, but Shull's written statement seems to suggest other DOT supervisors and "higher up people than me" were not disciplined. Shull's statement did not identify any of these DOT employees or provide any other details regarding the nature of the e-mails.

Allen also introduced into evidence a December 3, 2012, summary of the District #3 Office Staff Meeting Minutes. Item 1(b) states:

There continues to be issues regarding the inappropriate usage of computers for non-work related functions. Employees have been reminded of the policy and failure to comply could lead to discipline.<sup>12</sup>

Allen points to this December 3, 2012, memo as post-incident evidence that other DOT employees, perhaps supervisors, were still not aware of the computer usage policy. Allen testified that in his view, his conduct was a "normal practice by many" and he never received the opportunity to be told by the DOT about the policy. Allen could "guarantee several other [DOT employees]" were not aware of the policy. Allen thought recent efforts by the DOT to post written notice of the policy at all of the local DOT garages was a

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<sup>12</sup> Allen Exhibit 1.

good idea. But in his case, Allen argued, the notice came late, and in his view, unfairly late. Allen stated, "If you are not aware that something is wrong, you can't slap them for doing wrong. You need to let them know first. And that didn't happen in my case." As for the written policy that he did sign off on, Allen reasoned:

Just because a rule is in writing and available to you, does not mean you are aware of it. We have over three hundred policies to keep track of, which are constantly changing. There is no way anyone can be aware of all those . . . . To say that I need to know everything that is in every policy, I don't think is appropriate in any way at all.

Allen then added detail to Shull's written statement by claiming that he knew of two DOT employees who had sent and received inappropriate e-mails. One had only received a day off without pay and the other employee was not spoken to by her supervisor. Allen did not identify these employees nor state whether they were supervisors. According to Allen, the employees were listed on at least one of the fifty Allen e-mails contained in Exhibit A; however, Allen did not indicate which e-mail or e-mails.

In Allen's opinion there was "not equal treatment" and in his view, "I was a target and somebody was out to get me for some reason." Allen continued by claiming that, "I have a couple of employees that are determined to get me fired" and that this entire incident was "blown out of shape." Allen believes this should have been handled with a simple verbal warning.

Upon cross-examination, Allen admitted that all of the DOT policies pertaining to internet use are available online allowing one to review them at any time. Allen also acknowledged that every time he logs on to his work

computer there is a screen which reminds him as a state employee to limit use of the computer to only authorized use. In response, Allen stated that “Yes, it was my responsibility, but for me to know it word for word is ridiculous. I was not aware that what I sent was inappropriate . . . . I had nothing that would clue me it was inappropriate.”

The DOT asked whether Shull’s questioning him (as her supervisor) about the appropriateness of the nude-like photographs in the e-mail should have been a signal to Allen to check with Huju or possibly review the internet policy himself. In response Allen began by stating, “I would not have told her (Shull) to send them on if it didn’t feel that it was fine.” However, Allen later admitted, “Possibly, I should have. It all depends on what I got going on at the time.”

DOT counsel handed Allen the exhibit with the photographs and asked Allen, “Didn’t you just get a twinge that [the nude-like photographs] might be a little bit inappropriate?” Allen did not answer with “No.” Instead, Allen equivocated with a long, rambling statement which included: his thoughts on what his five year old granddaughter might see in the picture: a tree; that Allen had no control over what DOT counsel’s mind might see in the photographs; that the color photographs were a type of visual art; and that the instant “misperception” of nudity was similar to the misperception that occurs when one reads a misspelled word as being properly spelled. Allen then concluded by admitting that the purpose of the photographs probably was to show nudity,

but that the photographs were not pornography and he was not aware of the DOT policy against nudity.

The DOT next introduced into evidence a District #3 Office Staff Meeting Minutes dated April 4, 2011. The first item agenda provided:

The Iowa DOT PPM 030.09 regarding guidelines on Internet and Intranet Services has been revised. Employees are responsible for being familiar with the policy (PPM 030.09-attached separately). Department computers are being monitored for misuse. Tony will include a discussion about the policy at the next scheduled monthly District Office safety meeting.<sup>13</sup>

When asked about this memo, Allen admitted he had received a copy of meeting minutes in April 2011. Allen then added that in his mind that simply meant “no porn sites.”

#### CONCLUSIONS OF LAW

Iowa public employment law draws a distinction between those public employees who are covered by a collective bargaining agreement and those who are not. Because Allen was not a member of a public employment collective bargaining agreement, Iowa Code section 8A.415(2) applies to the resolution of this disciplinary appeal. Iowa Code section 8A.415(2) provides:

*Discipline resolution.* A merit system employee, except an employee covered by a collective bargaining agreement, who is discharged, suspended, demoted, or otherwise reduced in pay, except during the employee's probationary period, may bypass steps one and two of the grievance procedure and appeal the disciplinary action to the director within seven calendar days following the effective date of the action. The director shall respond within thirty calendar days following receipt of the appeal.

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<sup>13</sup> DOT Exhibit 13

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 employee has the right to a hearing closed to the public, unless a public hearing is requested by the employee. The hearing shall otherwise be conducted in accordance with the rules of the public employment relations board and the Iowa administrative procedure Act, chapter 17A. If the public employment relations board finds that the action taken by the appointing authority was for political, religious, racial, national origin, sex, age, or *other reasons not constituting just cause*, the employee may be reinstated without loss of pay or benefits for the elapsed period, or the public employment relations board may provide other appropriate remedies. Decisions by the public employment relations board constitute final agency action.

(Emphasis added.) Pursuant to this statute, this ALJ must decide whether there was “just cause” for the five day suspension imposed on Allen.

### *I. Burden of Proof*

Earliest PER Board precedent placed the burden of proof to establish “just cause” on the employer, the State of Iowa. *Lang and Iowa Dept. of Corrections*, PER Bd. 87-MA-09, at p. 8 (April 23, 1987). In *Lang* the PER Board had to decide whether a Mt. Pleasant Correctional Facility employee had been terminated for “just cause.” The allegations against Correctional Officer Lang included several incidents of improper involvement with an inmate and then lying about the incident. The State of Iowa’s evidence included the testimony of Lang’s supervisors, physical evidence of various contacts with the inmate, and the testimony of the inmate himself.

Because this was a case of first impression, for guidance the PER Board considered Iowa Supreme Court cases deciding teacher terminations. Although

teacher termination cases arose out of a different code provision-- Iowa code section 279.15-- that statute similarly required the employer (the school board) to show “just cause” for a teacher’s termination.<sup>14</sup>

The PER Board looked to *Board of Ed. of Ft. Madison Community School Dist. v. Youel*, 282 N.W.2d 677 (Iowa 1979), a case involving a teacher who was fired for the manner in which he had conducted himself as the head football coach. In *Youel* the Court determined that the initial burden of proof for “just cause” in a teacher termination case was on the employer. If the case is established, the employee on appeal must then demonstrate error by pointing out the lack of proof. *Id.* at 681. The PER Board reasoned that same approach should be followed in State of Iowa disciplinary appeals filed under Iowa Code section 8A.415(2). *Lang*, 87-MA-09, at p. 8.

Accordingly, in this case the DOT bears the burden of proof: “just cause” must be established based on evidence which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, even if that evidence would be inadmissible in a jury trial.<sup>15</sup>

## II. What constitutes “Just Cause.”

The Iowa Legislature has not defined “just cause” in either the teacher termination statute under section 279.15(2) or in State of Iowa merit appeals under section 8A.415(2). The Iowa Supreme Court has, however, decided many

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<sup>14</sup> Iowa Code section 279.15(2) (1979) provided in pertinent part: “The notification and recommendation to terminate [a teacher’s contract] shall contain a short and plain statement of the reasons, which shall be for just cause, why the recommendation is being made.” This language remains the same in the current Iowa Code. See § 279.15(2) (2013).

<sup>15</sup> This evidentiary test is set forth in Iowa Code section 17A.14 and included (by reference) in Iowa Code section 8A.415(2).

teacher termination cases and for more than twenty years the PER Board has looked to these cases to define “just cause.” See *Hunsaker and State of Iowa (Dept. of Employment Services)*, 90-MA-13 (Aug. 14, 1991). In *Hunsaker* the PER Board reasoned: “We can perceive no reason why the legislature’s use of the identical terms in § 19A.14(2) [teacher terminations] should be interpreted differently in merit employee termination cases.” *Id.* at p. 38. The PER Board then cited with approval broad language from a recent Iowa Supreme Court teacher termination case:

Probably no inflexible “just cause” definition we could devise would be adequate to measure the myriad of situations which may surface in future litigation. It is sufficient here to hold that in the context of teacher fault a “just cause” is one which directly or indirectly significantly and adversely affects what must be the ultimate goal of every school system: high quality education for the district's students. It relates to job performance including leadership and role model effectiveness. It must include the concept that a school district is not married to mediocrity but may dismiss personnel who are neither performing high quality work nor improving in performance. On the other hand, “just cause” cannot include reasons which are arbitrary, unfair, or generated out of some petty vendetta.

*Hunsaker*, 90-MA-13 at p.39 (quoting *Briggs v. Hinton Community School Dist.*, 282 N.W.2d 740, 743 (Iowa 1979)). The PER Board concluded its analysis by holding that a “just cause” determination:

Requires an analysis of all the relevant circumstances concerning the conduct which precipitated the disciplinary action, and need not depend upon a mechanical application of fixed “elements” which may or may not have any real applicability to the case under consideration.

*Id.* at p. 40.

The “elements” referred to in *Hunsaker* are a list of seven questions often used by arbitrators in deciding labor contract grievances. Known in the arbitration arena as “The Seven Tests” these factors require an arbitrator to consider whether:

1. The employee had been given forewarning or had knowledge of the employer’s rules and expected conduct;
2. The employer’s work rule was reasonably related to efficient and safe operation of the business.
3. The reasons for the discipline were adequately communicated to the employee and the employee was given the opportunity to explain the conduct.
4. A sufficient and objective investigation was conducted by the employer;
5. There was substantial evidence of the violation;
6. The employer has applied its rule evenhandedly to similar situated employees; and
7. The punishment imposed is proportionate to the offense and gives consideration to an employee’s employment record, including years of service, performance and disciplinary record.

Brand, *Discipline and Discharge in Arbitration*, pp. 31-32 (BNA Books, 1998).

If the answer to any of these questions is “no,” then an arbitrator would conclude “just cause” did not exist. *Id.* at p. 31. It is this “mechanistic” approach the *Hunsaker* Board rejected. *Hunsaker*, 90-MA-13 at p. 38.

At the same time the *Hunsaker* Board also made it clear that in a particular merit appeal, some of these “seven tests” may be relevant factors to consider. The *Hunsaker* Board cited, as examples, a case where a terminated teacher was given no real opportunity to remedy the complaints against him and another case where the court considered relevant the fact that the

terminated teacher was trying his utmost to do what was expected of him. *Id.* at pp. 39-40.

### *III. Analysis*

Turning to the instant case, Allen raises three issues: 1) The DOT did not give him sufficient notice his conduct was inappropriate; 2) The DOT policy has not been applied with consistency; and 3) The DOT should have only given him a verbal warning.

This ALJ concludes that there is no merit to Allen's claims, that Allen knowingly violated work rules, that "just cause" existed for DOT's discipline and that Allen's appeal must be dismissed.

#### *a. Notice.*

Without question, an employee can expect an employer to place reasonable limits on the use of work computers and work e-mail accounts. This is especially true in the context of public employment, where public dollars have paid for both. In this case, the DOT took steps to establish those limits and to make sure its employees were aware of the policies.

Since 2002 the DOT's written policy has limited the personal use of work computers to incidental use on non-work time, such as during a meal break. Employees are prohibited from sending jokes and large non-business attachments such as video and audio attachments.<sup>16</sup> In March of 2011, the DOT added limits on the use of all DOT internet resources to include employees who connect to the DOT internet service from home or remote

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<sup>16</sup> DOT Exhibit 5.

locations. In particular, the DOT policy expressly prohibited an employee to access the DOT internet service from home for personal use. This policy also prohibited a DOT employee from sending materials which are pornographic, sexually oriented, or otherwise embarrassing in nature.<sup>17</sup> What is more, these DOT internet policies complemented the *State of Iowa's Employee Handbook* which prohibits the personal use of internet resources to the extent that it interferes with productivity or reflects poorly on state government.<sup>18</sup> All of these policies are available on-line. Finally, no DOT employee can log on to a DOT computer without being reminded to limit use of the computer to work related matters.

In this case, there was evidence that in March 2011, Allen signed that he had read the *Employee Handbook*, and had an opportunity to ask questions about its content.<sup>19</sup> Also, in April 2011, Allen admitted he had received and read a copy of the staff meeting minutes for his district which provided, as its very first agenda item, the following:

The Iowa DOT PPM 030.09 regarding guidelines on Internet and Intranet Services has been revised. Employees are responsible for being familiar with the policy (PPM 030.09-attached separately). Department computers are being monitored for misuse. Tony will include a discussion about the policy at the next scheduled monthly District Office safety meeting.<sup>20</sup>

This is the policy which expressly prohibits sending sexually oriented material, not just pornography.

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<sup>17</sup> DOT Exhibit 6.

<sup>18</sup> DOT Exhibit 8.

<sup>19</sup> *Id.*

<sup>20</sup> DOT Exhibit 13

Allen's testimony on this issue was neither consistent nor persuasive. Several times Allen claimed that he knew he couldn't send pornography but that this wasn't pornography, and he didn't know sending nude-like photographs was inappropriate. This ALJ cannot agree.

The photographs Allen sent are very explicit. This ALJ personally finds them to be both vulgar and pornographic in nature. The e-mail was appropriately entitled—"A Matter of Perspective—Keep Your Mind Out of the Gutter." This title alone should have given Allen pause. Nevertheless, somehow Allen determined this would be a "humorous" e-mail to send to an employee he supervised, and somehow determined it would be okay to send it to her at work. This ALJ finds Allen used extremely poor judgment in doing so. Sadly Allen's poor judgment continued when the employee e-mailed Allen back questioning the appropriateness of forwarding the e-mail, and Allen failed to reconsider and say "no."

This ALJ further finds that Allen was well aware of the March 2011 DOT policy revision which excluded both pornography and sexually oriented materials. While Allen may not agree with this ALJ that the photographs were pornographic, Allen did finally admit that the photographs were sexually oriented and that the purpose of the photographs "probably" was to show nudity.

*b. Consistent Policy.*

Allen contends that the DOT has not been consistent in applying its internet policy. The evidence in the record compels this ALJ to find otherwise.

McKenna testified that nudity in a DOT e-mail was a terminable offense and that other DOT employees have been fired for such inappropriate conduct. In this case both Allen (who originated the e-mail) and Shull (who forwarded the e-mail) were both initially placed on suspended leave pending investigation. Although Allen complained about this treatment, this ALJ concludes the DOT handled Allen's investigation as it would any other similarly situated DOT employee.

Allen (and Shull in her written statement) both alleged other DOT employees have not been investigated or disciplined for sending inappropriate e-mail. However, neither provided any names, let alone details. Allen also claimed his former supervisor was okay with sending these kinds of e-mails. Even assuming that to be true, nevertheless, that conduct pre-dated the March 2011 policy revision and now serves as no defense to Allen. As an aside, this ALJ notes that Allen's willingness to try to excuse his behavior by pointing to similar behavior by his former supervisor, understandably explains why the DOT has to hold its supervisors to a higher standard of conduct.

*c. The Nature of the Discipline.*

Finally Allen claims that he should have only received a verbal warning, rather than a five day suspension. In Allen's words, this entire incident was "blown out of shape." This ALJ cannot agree.

McKenna testified that because of the nude-like photographs in the e-mail Allen could have been terminated from employment and that other DOT employees have, in fact, been terminated. McKenna also testified that the final

decision to award a five day suspension was the consensus of the human relations team after taking into careful consideration Allen's excellent work record and many years of service. Her testimony implicitly suggested to this ALJ that but for Allen's many years of excellent work history, Allen would have been terminated.

Finally, although much of the focus of this case has appropriately been on the sexually oriented e-mail, that e-mail was just one of fifty e-mails contained in DOT Exhibit #1. This exhibit spans more than two hundred pages of jokes, music files, and other photographs. Almost all of Allen's jokes are inappropriate and tasteless. Accordingly, this ALJ further concludes that the nature and scope of Allen's e-mail conduct both "interfer[ed] with productivity [and] reflect[ed] poorly on state government . . . . contrary to the goal of efficient state government service" as proscribed by *The State of Iowa's Employee Handbook*. This ALJ reaches this conclusion only for the purpose of agreeing with the DOT that this was not a trivial proven offense and disagreeing with Allen that it was "blown out of shape."

#### *IV. Conclusion.*

This ALJ concludes that the DOT has met its burden of proof to establish that Allen knowingly violated DOT work rules when he forwarded a non-work related e-mail to a subordinate's work e-mail account, and then gave that employee permission to forward that e-mail to other employees.

This ALJ also concludes the DOT treated Allen fairly and consistently both with regard to the investigation and in determining an appropriate punishment.

Finally, this ALJ finds “just cause” for the five day suspension. Allen’s appeal is dismissed.

So ordered.

Dated at Des Moines, Iowa this 11th day of April, 2013.



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Robert D. Wilson

Administrative Law Judge

Original filed.

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