

STATE OF IOWA  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

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PUBLIC EMPLOYMENT  
RELATIONS BOARD

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DEBRA K. WILSON,	)	
Appellant,	)	
	)	
and	)	CASE NO. 13-MA-09
	)	
STATE OF IOWA (Department of	)	
Human Services, Glenwood Resource	)	
Center),	)	
Appellee.	)	

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PROPOSED DECISION AND ORDER

Appellant, Debra K. Wilson filed a state employee disciplinary action appeal with the Public Employment Relations Board (PERB) alleging that her termination from the Glenwood Resource Center on March 20, 2013 was without just cause within the meaning of Iowa Code section 8A.415(2).

Pursuant to notice, an evidentiary hearing on the merits was held before me on February 12, 2014, at the PERB office in Des Moines, Iowa. The Appellant was represented by attorney Luke DeSmet and the State was represented by attorney Laura Mommsen. Both parties submitted post-hearing briefs which were filed on April 4, 2014. Based upon the entirety of the record, and having given due consideration to the arguments of the parties, I conclude that the State has failed to establish just cause for its discharge of Debra Wilson because it has failed to establish that she violated any provision of the Return to Work agreement previously entered into by the parties.

## FINDINGS OF FACT

Debra Wilson began employment with the Iowa Department of Human Services (DHS) on March 26, 2003, as a Resident Treatment Supervisor (RTS) at Glenwood Resource Center (Glenwood or GRC). Glenwood is a twenty-four hour a day, seven days a week facility for disabled and mentally handicapped individuals. The facility is divided into three areas and within each area there are seven to eight residential houses. Wilson was assigned to Area 3 and worked the pm shift. Wilson's immediate supervisors were Cindy McConahay, PM Administrator, and Douglas Wise, Program Treatment Administrator for Area 3. Wise supervised the PM Administrators and reported to Zvia McCormick, Glenwood's superintendent during the applicable time frame. Pam Stipe, Public Service Supervisor 3, was head of human resources at Glenwood. As an RTS, Wilson's tasks were primarily office related. However, she also supervised approximately 60 staff members and made rounds to the various Area 3 houses to ensure that staff were performing their jobs as well as ensuring client safety. In addition, as an RTS, she carried the backup keys for the medication rooms in the area and would occasionally cover for the Administrator on Duty (AOD) who assisted physicians in accessing the area's pharmacy room by unlocking one of three locks.

Wilson was disciplined on two separate occasions prior to her termination. On January 14, 2012, Wilson received a letter of reprimand for failure to follow DHS/GRC work rules and State policies when handling confidential information. On April 16, 2012, Wilson received a one-day paper

suspension<sup>1</sup> as a result of her failure to timely report an incident as required by various DAS (Department of Administrative Services) rules. Wilson did not challenge either of these disciplinary actions through the State's disciplinary procedures specified in Iowa Code section 8A.415(2).

Wilson had a substance abuse problem. On July 12, 2012, Treatment Program Administrator Wise informed her that she was being suspended with pay pending the completion of an investigation into Wilson's possible use of an illegal substance while employed at Glenwood. Wilson's interview took place over a two day period; July 12 and 13. During one of the interviews, Wilson admitted that she had a substance abuse problem. As a result of this admission and in lieu of discharge, the parties, on July 13, 2012, entered into a Return to Work Agreement (Agreement). Although Wise reviewed the Agreement with Wilson prior to its execution, the record does not contain any evidence as to Wise's explanation of its provisions. As will be noted additionally below, the absence of Wise's testimony at this hearing is problematic.

The acknowledgement to the agreement stated:

I want you to please make sure you understand the contents and your obligation to this "Return to Work Agreement." We will not be contacting you to make sure you are completing the agreement requirements. You will be the one responsible for providing us with the necessary documentation and keep us informed of your progress or any roadblocks you might experience that could jeopardize this agreement.<sup>2</sup>

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<sup>1</sup> This was a "paper" suspension as Wilson worked on that day and was paid for that day.

<sup>2</sup> State's exhibit S-18

The Agreement stated:

1. Deb Wilson agrees that as a condition of her continued employment, she will abide by the treatment plan developed by her substance abuse treatment center and will successfully complete treatment for her substance abuse condition.
2. Deb Wilson will be placed on her own paid leave and then approved leave without pay while she does the following:
  - A. Receives a substance abuse evaluation from a certified substance abuse professional (SAP) which makes a diagnosis of dependency within 5 business days from signature of this agreement.
  - B. Signs a release of information to allow the SAP to release information to Zvia McCormick, Superintendent, Glenwood Resource Center, regarding the diagnosis, treatment recommendations and plan, and aftercare plan requirements.
  - C. Completes all aspects of the prescribed treatment plan, aftercare plan and all relative treatment recommendations provided to her by her treatment provider and provides proof of attendance and participation in the recommended treatment plan.
  - D. Provides weekly, written updates from the treatment provider. The weekly updates must include information relative to your progress, attendance/participation and your current status in the treatment program.
  - E. If and when Deb Wilson is released from treatment, she must immediately provide written notice from the treatment provider.
3. Before returning to work, Deb Wilson agrees that as a condition of her continued employment, she must provide a full release to return to work with no restrictions.
4. Deb Wilson will provide to Zvia McCormick a copy of the aftercare plan and continued proof of participation in the aftercare plan as requested by Zvia McCormick or designee.
5. Any subsequent appointments during regularly scheduled work hours relating to treatment, counseling, or therapy recommended by the substance abuse treatment plan will be covered by sick leave provisions.
6. Deb Wilson further agrees that as a condition of her continued employment and treatment, she agrees to abstain from the use of all alcohol and/or controlled substances.
7. Violation of any of the provisions of this agreement, the State of Iowa Substance Abuse Policy, State of Iowa Drug Free Workplace Policy or DHS Work Rule D-1 (27) regarding

substance abuse by Deb Wilson will result in immediate discharge from Glenwood Resource Center.

8. This agreement is a good faith agreement of all issues arising from the facts of the investigation. No promises for any other or future consideration have been made by anyone.
9. The above consideration is all that will be received for the claims and potential causes of action addressed and arising from this situation.
10. The terms of this Agreement are considered by the parties to pertain only to the specific facts involved in this matter. Neither party shall rely on this Agreement or cite the same as precedent in any grievance, arbitration, litigation or other proceeding in the future.<sup>3</sup>

The purpose of the Agreement was to allow Wilson to obtain treatment in order to resolve her substance abuse issues and to return to employment at Glenwood. The Agreement contained provisions of both limited duration as well as other provisions without limiting language which in effect would last for the remainder of Wilson's employment.

The parties are in agreement that Wilson complied with several paragraphs of the Agreement. However the parties disagree whether Wilson complied with paragraphs 2(B) and 3. As to these two paragraphs, I find both were limited in duration. Paragraph 2(B) only appears to require that Wilson provide a release of information regarding diagnosis (which occurred at Manning), treatment recommendations and plan (which occurred at Manning) and aftercare requirements (which occurred at both Manning and Heartland). Paragraph 3 ends when a full work release with no restrictions is provided to Glenwood.

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<sup>3</sup> State's exhibit S-19 and Appellant's exhibit 5

On July 19, 2012, Wilson obtained a substance abuse evaluation from Manning Regional Healthcare Center. On July 25, Wilson entered Manning's in-patient residential treatment program, and two days later signed the consent for release of information so that treatment information could be released to Glenwood pursuant to the Agreement. It is uncontested that Glenwood received copies of all of the necessary documents, thus complying with the Agreement. Wilson completed this program and was discharged by Manning on August 24. At hearing, an issue arose as to whether the document Manning provided to Glenwood constituted a full release. However, because the document released, as provided to Glenwood, was not entered into evidence, I have not reached a conclusion as to this release.

On August 30, 2012, Wilson began her aftercare treatment program with Heartland Family Service. Based upon Manning's recommendation, Wilson's aftercare plan encompassed 16 weeks and consisted of attending group sessions (3 times per week) and individual sessions (every other week). Wilson's individual counselor at Heartland was Sharon Heckathorn.

On September 6, Wilson signed Heartland's "authorization to release confidential protected health information". The authorization provided that:

This authorization is subject to revocation at any time except to the extent that action has already been taken on it. I understand that this authorization shall remain in effect until withdrawn or canceled by me *in writing* or until (date) 9/6/13 (not more than 90 days if one time disclosure or not more than 12 months if ongoing disclosure) or until I am no longer receiving services from Heartland Family Service. A copy of this authorization is as good as the original.<sup>4</sup>

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<sup>4</sup> State's exhibit S-29

Consequently, this release of information was good until September 6, 2013 unless one of the exceptions took effect. On September 10, 2012, Glenwood received, via fax, the Heartland Family Service aftercare plan and the next day a copy of the release signed by Wilson was received by Glenwood.

While receiving aftercare treatment at Heartland, Wilson expressed a desire to come back to work. On September 26, Wilson requested a meeting with Superintendent McCormick to discuss this possibility. The next day, Superintendent McCormick spoke with Heckathorn, Wilson's counselor. McCormick informed her that a letter and essential functions of Wilson's position were being sent to her for review. On September 28, Wise, Stipe and Superintendent McCormick met with Wilson regarding her request. In that meeting, Wilson was informed she would need to abide by the Agreement. Notes from the meeting show that at the conclusion of the meeting, Superintendent McCormick informed Wilson "that we would fax a letter with essential functions on Monday to [Heckathorn] [and] if she said Deb could do the job then she would return Deb to work."<sup>5</sup> There is no evidence in the record as to whether Wilson was given a copy of the letter and list of essential functions or whether she knew what duties Glenwood deemed essential.

On October 3, Wise received a letter, via fax, from Heckathorn which did not contain any restrictions. After Glenwood received this letter, Superintendent McCormick called Heckathorn and while discussing the essential functions of Wilson's job asked if she was aware that the position

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<sup>5</sup> State's exhibit S-32

required having access to medications. According to Superintendent McCormick, Heckathorn agreed that Wilson should not have access to the medicine room or give medications until treatment was completed but that long-term Wilson would be able to perform her entire job. Based upon this discussion, a new letter, also dated October 3, was sent to Glenwood from Heckathorn. This letter was also addressed to Wise and stated in part:

This is a letter in response to a request that I received from you. In your written correspondence with me you requested that I comment on Ms. Wilson's ability to perform the essential functions of her job. Per our conversation today on the phone, I explained that I was unable to complete the request that you sent to me as I have not seen Ms. Wilson perform the duties of her job. However, what I can comment on given my education and licensure is her mental health and substance abuse treatment progress.

.... It would appear at this time that she is stable enough to return to work and complete the core functions of her job. However, as a precaution she should not be allowed to have access to medication until she has completed her treatment with Heartland Family Service and/or her employer feels that she is able to safely handle medications again.

\* \* \*

The client is recommended to remain at the extended outpatient level of care. It is estimated that the client will remain at this level of care for another 3 months. The client's level of care could change depending on her treatment progress. As the client progresses further into her treatment a specific aftercare plan will be developed. This plan will help the client as she transitions out of treatment with Heartland Family Service to a more informal support network....<sup>6</sup>

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<sup>6</sup> State's exhibit S-33 and Appellant's exhibit 9

On October 5, Superintendent McCormick emailed Stipe and Wise approving Wilson's return but noted that "CMA duties and med room access suspended until full treatment completed."<sup>7</sup>

Wilson did not receive copies of Heckathorn's two October 3 letters from either Superintendent McCormick or Heckathorn, nor did Superintendent McCormick inform Wilson that she was subject to a work restriction; suspension of the CMA duties and medication room access. It is contested as to whether Wise told Wilson of the letters and their contents. Wilson, throughout the hearing, denied knowledge of the letters and the limitation contained in the second letter. As noted above, Wise did not testify. Stipe testified that she was not sure if Wise informed Wilson. Superintendent McCormick testified that she believed that Wise told her that he had informed Wilson about the restriction. These hearsay statements are not persuasive evidence that Wilson knew of Heckathorn's letter containing the limitation; "as a precaution she should not be allowed to have access to medication until she has completed her treatment with Heartland Family Service and/or her employer feels she is able to safely handle medications again." Additionally, the two PM Administrators, Cindy McConahay, Wilson's supervisor, and Dan Hunter, who occasionally supervised Wilson, were unaware of Superintendent McCormick's email suspending Wilson's CMA duties and medication access.

On October 15, 2012, Wilson returned to Glenwood as an RTS. Wilson was not informed of Heckathorn's letter containing the limitation nor

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<sup>7</sup> State's exhibit 35

Superintendent McCormick's suspension of duties with regards to CMA duties and medication access. Upon returning to work, Wilson assumed the duties of an RTS and carried keys that accessed medications. According to Wilson, Wise was aware that she had these keys.

On January 3, 2013, Wilson completed her aftercare program. Seven days later, on January 10, Glenwood was notified of Wilson's completion via a faxed letter which stated in part:

At this time Ms. Wilson has completed all of her required treatment. She has requested to continue to meet with me for support and may also attend group one time per week for additional support. This additional support is not part of the original recommendations that were given at her evaluation.

Ms. Wilson has achieved all of the goals that were set on her treatment plan. She will continue to work on maintaining these goals and understands that aftercare support services are helpful in maintaining her sobriety. If there are any questions about the content of this letter please contact Sharon Heckathorn....<sup>8</sup>

Because the additional support noted in this letter was not part of the aftercare plan, I find that Wilson completed her aftercare plan on January 3, 2013.

Sometime in January while performing AOD functions, Wilson assisted a physician in accessing the area's pharmacy room upon the direction of PM Administrator Hunter. However, there is no evidence that either Wise or Superintendent McCormick were aware of this incident.

At the end of January or early February, Wise gave a questionnaire regarding Wilson's ability to perform the essential RTS job functions to Wilson for Heckathorn to complete. Additionally, Wise asked for copies of all

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<sup>8</sup> State's exhibit S-36 and Appellant's exhibit 10

substance abuse testing from September 2012 to the present. A few days later, Wise asked Wilson the status of the requested information and Wilson informed him that she had not given it to Heckathorn as she did not believe that Heckathorn would fill it out. Wise told her to return the paperwork and he would fax it to Heckathorn, which he did on February 18, 2013. The fax contained a letter asking that Heckathorn answer and comment on several questions with regards to Wilson's ability to perform the essential functions of her job. Two days later, on February 20, Wise received a voice mail from Heckathorn informing him that because Wilson had rescinded her release of information, she could no longer communicate with Glenwood about Wilson. Later that day, Wise asked Wilson about the rescission. On February 25, Wise spoke to Heckathorn. Although there is conflicting testimony as to the circumstances surrounding the rescission, what is relevant is that the release of information was rescinded in mid-February.

On February 26, 2013 Wise prepared an investigatory statement regarding Wilson's rescission of the release of information from Heckathorn to Glenwood. The next day, February 27, Wise notified Wilson, via letter, that she was being suspended with pay pending the completion of an investigation. Later that day, two other Treatment Program Administrators, King and Rosenfeld, conducted an investigatory interview. The interview centered on the withdrawal of the consent for the release of information and the conversation that Wilson and Wise had on February 20. At the end of the interview, Rosenfeld informed Wilson that a signed release of information needed to be

faxed into Glenwood by 10:00 a.m. the following day, February 28. The release was received by Glenwood, via fax, at 11:06 a.m. on February 28, 2013.

On March 4, Stipe sent a questionnaire to Heckathorn seeking to verify whether Wilson's statements made in the investigatory interview were true. The following questions were included in the questionnaire:

6. Have you had a conversation with Debra Wilson regarding her return to work release? If so, what did the conversation consist of?
7. On 10/3/12 we received a letter from you regarding Debra's return to work. At that time you stated that she "was stable enough to return to work and complete the core functions of her job. However, as a precaution she should not be allowed to have access to medication until she has completed her treatment with Heartland Family Service and/or her employer feels that she is able to safely handle medications again." On 1/3/13<sup>9</sup> we received a letter from you stating that "Ms. Wilson has completed all of her required treatment." Do you believe that Debra Wilson can now have access to medication in order to perform CMA duties?<sup>10</sup>

Although the State received a letter from Heckathorn on March 7<sup>th</sup>, this letter was not offered into evidence.

On March 20, 2013, Wise conducted a *Loudermill* hearing. This hearing centered on Wise's request for information from Heckathorn and the withdrawal of the consent for the release of information. During the hearing, there was no discussion or questioning about whether Wilson knew of the limitation contained in Heckathorn's October 3 letter. At the end of the meeting, Wise informed Wilson that she was being terminated. The

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<sup>9</sup> The letter was dated 1/3/13, but the fax stamp, on State's exhibit S-36, shows the date of 01-10-13.

<sup>10</sup> State's exhibit S-43

termination letter dated March 20, 2013 stated that Wilson was terminated as a “result of your failure to comply with your Return to Work Agreement dated July 13, 2012 specifically 2B and 3.”<sup>11</sup>

Wilson appealed her discharge to the director of DAS pursuant to Iowa Code section 8A.415(2) and Chapter 61 of the DAS rules. A third-step meeting was held on April 11, 2013 and the third-step response was issued by the DAS director’s designee on May 7, 2013 which upheld Wilson’s termination. The director’s designee determined that there was just cause for terminating Wilson. Wilson timely appealed the third-step response to PERB pursuant to Iowa Code section 8A.415(2)(b) and PERB rule 621-11.2

At hearing, Wilson testified on her behalf. Stipe and Superintendent McCormick testified for the State. Although Wise is employed at Glenwood and was included in the list of State’s potential witnesses, the State elected not to call him and instead relied upon the February 26, 2013 investigatory statement and a transcript of the *Loudermill* hearing.

#### CONCLUSIONS OF LAW

Wilson filed this appeal pursuant to Iowa Code section 8A.415(2)(b) which provides:

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

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<sup>11</sup> State’s exhibit S-44 and Appellant’s exhibit 14

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....

In discipline cases, the State bears the burden of establishing just cause for the discipline imposed. *Gleiser and State of Iowa (DOT)*, 09-MA-01 at 18; *Harrison and State of Iowa (DHS)*, 05-MA-03 at 9.

The parties have not cited, nor could I find a case in which PERB determined whether the State had just cause to terminate an employee due to the failure to follow a return to work agreement.<sup>12</sup> However, the issue before me is the same as other 8A.415(2) cases; whether the State had just cause to discharge the Appellant under the terms of the agreement executed by the parties on July 13, 2012. In so doing, a determination first must be made as to whether the State has met its burden of proving that Wilson was in violation of the agreement cited in the termination letter. If the State meets this burden then a determination is also made as to whether these violations constitute just cause for termination. *Gleiser, supra*, at 19; *see e.g., Harrison, supra*.

The term “just cause” as used in section 8A.415(2)(b) and DAS administrative rule 11-60.2 is not defined by statute or rule. *Gleiser, supra*, at 16; *Harrison, supra*, at 8. In determining whether just cause is established, PERB has long held that there is no fixed test to be applied. However, there are several factors that the Board has considered, including but not limited to:

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<sup>12</sup> In *Gleiser*, the State alleged in part that the Appellant was terminated as a result of violating his Return to Work Agreement, however, PERB did not rule upon that allegation. *Gleiser, supra*, at 21-22.

whether the employee has been given forewarning or has knowledge of the employer's rules and expected conduct; whether a sufficient and fair investigation was conducted by the employer; whether reasons for the discipline were adequately communicated to the employee; whether there is sufficient proof of the employee's guilt of the offense; whether progressive discipline was followed, or is not applicable under the circumstances; whether the punishment imposed is proportionate to the offense; whether the employee's employment record, including years of service, performance and disciplinary record has been given due consideration; and whether there are other mitigating circumstances which would justify a lesser penalty. *Gleiser, supra*, at 16-17; *Harrison, supra*, at 8-9.

The State argues that it had just cause to terminate Wilson as she violated paragraphs 2(B) and 3 of the Return to Work Agreement.

Paragraph 2(B):

Turning to the State's first allegation that Wilson violated paragraph 2(B) of the agreement, a determination must be made as to whether there is sufficient proof that Wilson violated this paragraph. Paragraph 2(B) of the agreement requires a release of information "regarding the diagnosis, treatment recommendations and plan, and aftercare plan requirements." The State argues that this paragraph requires the release of information to continue throughout her employment at Glenwood. Although the Agreement contains paragraphs with unlimited duration lasting the remainder of Wilson's employment, this particular paragraph is of limited duration. It only appears

to require that Wilson provide a release of information regarding diagnosis (which occurred at Manning), treatment recommendations and plan (which occurred at Manning) and aftercare plan requirements (which occurred at both Manning and Heartland). It is uncontested that Glenwood received Wilson's diagnosis from Manning, treatment recommendations and treatment plan from Manning, and Manning's and Heartland's aftercare plan requirements, thus meeting all of the conditions of paragraph 2(B). In fact, Wilson's release of information extended beyond the period required by paragraph 2(B). It continued while Wilson participated in the prescribed aftercare programs at Heartland which ended January 3, 2013. Although Heartland's release was terminated mid-February, this was over a month after Wilson successfully completed the aftercare program. Based upon these facts, I conclude that Wilson did not violate this paragraph and thus the State has failed to establish just cause for Wilson's termination on the basis that she violated paragraph 2(B) of the Agreement.

Paragraph 3:

Next, the State alleges that Wilson violated paragraph 3 of the Agreement, which requires that Wilson provide a full work release without restrictions before returning to work. Wilson argues that she provided two full work releases. She contends that the Manning release and Heckathorn's first October 3 letter constituted full releases with no restrictions, thus both meeting the requirements of paragraph 3. As to the Manning work release, I cannot conclude that it satisfied the requirement of paragraph 3 as it was not

entered into evidence. The first Heckathorn letter satisfied the requirement of paragraph 3 but it was quickly modified by a second October 3 letter.

The State argues that it was Heckathorn, Wilson's counselor, who insisted that Wilson should not have access to medications, and because a full work release was never provided by Heckathorn, Wilson violated the terms of the Agreement. Wilson argues that the second Heckathorn letter was a "restricted" release written at the request of Superintendent McCormick. Wilson further argues that she was unaware of the restrictions and thus had no way of knowing that she had not complied with paragraph 3 of the Agreement.

Regardless of whether the restriction came at the insistence of Heckathorn or at Superintendent McCormick's request, the issue in this case is whether Wilson had knowledge or a basis to know that Heckathorn's letter containing the phrase "as a precaution she should not be allowed to have access to medication until she has completed her treatment with Heartland Family Service and/or her employer feels she is able to safely handle medications again" would be construed by the State as a restricted release and not in compliance with the Agreement.

Assuming that the above cited phrase rises to the level of a limitation, the State has failed to establish that Wilson was aware of the limitation contained in the second letter.

Wilson repeatedly testified that she was unaware of Heckathorn's second October 3 letter, which contained the limitations on her duties. There was no

direct evidence to rebut Wilson's assertion that she was unaware of the limitation. The only evidence regarding Wilson's knowledge of the limitation was hearsay evidence by the State's two witnesses. Stipe testified that she was not sure if Wise informed Wilson. Superintendent McCormick testified that she did not recall telling Wilson about the restriction, but believed she had been told, by Wise, that he had informed Wilson. The absence of any direct testimony, especially by Wise, is problematic. He was included on the State's list of proposed witnesses, however, instead of calling Wise, the State elected to enter into evidence a transcript of the *Loudermill* hearing and Wise's investigatory statement of February 26. Both documents are silent as to whether Wise informed Wilson of the Heckathorn letter and whether Wilson knew of the limitation.

PERB has previously confronted the issue of hearsay testimony when it is directly controverted by direct testimony. See *Toni E. Harrison, supra*. In that case, the Board refused to give controlling weight to the hearsay statement of an absent but available witness. *Id.* at 11. The Board cited and summarized several contractual grievance arbitration proceedings as they were directly analogous to Iowa Code section 8A.415. One such case was *IBP, Inc. and General Drivers, Local 556*, 112 LA 981 (Lumbley, 1999). The Board stated:

In *IBP, Inc. and General Drivers, Local 556, supra*, the arbitrator concluded the employer had not established just cause to discharge the grievant for fighting, where the grievant testified at hearing but the employer presented only written hearsay statements given by others. The arbitrator determined that the hearsay evidence did not outweigh otherwise credible live

testimony such as that given at hearing by the grievant, and credited his version of events. (Id. at pp.983-84).

*Harrison, supra*, at 13.

Inasmuch as Wilson was the only party to provide direct testimony to the relevant discussions at the hearing, I find that the two State witnesses' hearsay testimony is insufficient to outweigh Wilson's live testimony. As to the limitation contained in the second Heckathorn letter, I conclude that Wilson was not informed of the letter or its contents until late January or early February, 2013. In the meeting on September 28, Superintendent McCormick informed Wilson that if Heckathorn believed she could perform the essential functions of her job, then she could return to work. Superintendent McCormick did not inform Wilson of the limitation. When Wise informed Wilson that she could return to work on October 15, Wise did not inform Wilson that Heckathorn had included a restriction in her October 3 letter which Glenwood viewed as a restricted, not a full work release. Further, during the approximately three months while working, Wilson was never informed that any limitation existed with regards to her access of medications. In fact, during this time, Wilson carried the backup keys for the medication room in her area. Nor was Wilson told of this limitation and the need to get a full work release after Glenwood received Heckathorn's January 3 letter informing it of Wilson's successful completion of her aftercare plan. Although Wilson signed an acknowledgement that she was responsible for providing the necessary documentation, Glenwood had a duty to inform Wilson that she was returning to work subject to limitations, particularly when the terms of the agreement

indicated that she would not return to work unless she obtained a full work release with no restrictions. Without this communication, the State led Wilson to reasonably believe she had no limitations and had fully complied with the Agreement.

Wilson's testimony is corroborated by the fact that there is no evidence that Wilson's supervisors were aware of any limitation. In fact, they allowed Wilson, as an RTS, to carry backup keys to the medication rooms, and Wise was aware that Wilson had these keys. Further, in January while Wilson was acting as AOD, she assisted a physician in accessing the area's pharmacy room. The State contends that these instances should not be given any weight for two reasons. First the State asserts Wise was unaware of Wilson's performance of the AOD duty. Second, the State argues that Wise may not have told the supervisors about the limitation out of respect for Wilson's privacy. However, these explanations are disingenuous as the limitation was in place as a result of a conversation Superintendent McCormick had with Heckathorn regarding Wilson dispensing medications.

Under the circumstances of this case, there is insufficient proof that Wilson had knowledge of any limitation on her ability to perform the essential functions of her job. It was Wilson's belief that she had been fully released when she returned to work on October 15, 2012. Glenwood allowed Wilson to perform the RTS duties without any restrictions after she returned to work as evidenced by her carrying the backup keys. Glenwood was remiss in not notifying Wilson, or even her supervisors, of any limitation. This lack of

notification cannot be used to the detriment of Wilson. Heckathorn's letter received by Glenwood on January 10, 2013 had the effect of being a full release, thus meeting the requirements of paragraph 3. Therefore, I conclude that the State has not met its burden to prove that Wilson violated paragraph 3 of the Agreement. Accordingly, the State has failed to establish just cause to terminate Wilson.<sup>13</sup>

Having concluded that the State failed to carry its burden of establishing just cause within the meaning of Iowa Code section 8A.415(2), it is unnecessary to consider whether discharge would have been warranted as a sanction had Wilson's violation of the Return to Work Agreement been established. *Harrison, supra*, at 13.

Remedy:

While both parties are in agreement with regards to reinstatement if I do not uphold the discharge, other remedial terms appear to be in dispute. Wilson argues besides reinstatement, she should be awarded back pay and otherwise be made whole. The State argues that the remedy should be limited to the relief Wilson requested on the State Employee Disciplinary Action Appeal form which provided: "(r)eturn to work with all seniority and sick leave accrual."

I agree with the parties that Wilson should be reinstated to her former position. PERB has typically found that when an employee's discharge is

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<sup>13</sup> Because these two paragraphs were the basis for the discharge, I need not address the other arguments made by the State.

found to have been without just cause, the employee is reinstated with back pay and benefits as specifically authorized by section 8A.415(2). *Gleiser, supra*, at 22; *Harrison, supra*, at 5-6.

Our established caselaw requires that we ... attempt to place the grievant in the position he would have been in had no rule violations occurred, and to make the grievant whole for damages incurred.

*Harrison, supra*, at 5 (Decision & Order 2008).

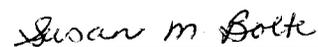
Accordingly, I propose the following:

ORDER:

The State shall reinstate Debra K. Wilson to her former position with back pay and benefits, less interim earnings, restore her benefit accounts to reflect accumulation she would have received but for her discharge, make appropriate adjustments to her personnel files and take any other actions necessary to restore her employment status to what it would have been had she not been discharged. Upon reinstatement, Wilson shall continue to be subject to the Return to Work Agreement that was executed by the parties on July 13, 2012.

DATED at Des Moines, Iowa this 6th day of June, 2014.

PUBLIC EMPLOYMENT RELATIONS BOARD

  
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Administrative Law Judge

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