

denied the motion on August 7. On August 25, the State requested the hearing be continued due to extenuating circumstances and a new hearing date of September 25 and 26 was set. The State filed a second motion for summary judgment on September 3. On September 17, the grievants filed a resistance to the motion for summary judgment and the undersigned denied the motion on September 18.

A public evidentiary hearing on the merits was held on September 25, September 26 and October 2, 2014. The appellants were represented by Wendy Dishman and the State was represented by Karin Gregor and Stephanie Reynolds. At the start of the hearing Dishman withdrew the appeals of Kathy Kieler (case no. 14-MA-05), Mary Spracklin (case no. 14-MA-08) and Mindla White (case no. 14-MA-09) so these appellants are no longer parties to this case. The representatives submitted post-hearing briefs on October 23. After considering the evidence and arguments of the parties, I hereby propose the following:

FINDINGS OF FACT

The appellants, Wendy Dishman, Kathy Sutton, Dawn Fisk and James Smith are all state employees who work for the Department of Inspections and Appeals (DIA). The Director of the DIA is appointed by the governor. The current Director is Rod Roberts. The Deputy Director of the DIA is Beverly Zylstra.

Appellant Wendy Dishman has worked for the DIA since 2006. She originally was hired as the Administrator of the Abuse Coordinating Unit. Since 2010 she has been the Administrator of the Investigations Division.

According to her position description questionnaire she "is responsible for coordinating the Division's investigations and administration" which includes managing and coordinating investigations of fraud in the State's public assistance programs, Medicaid fraud by health care providers, alleged abuse, neglect and fraud related to dependent adults in health care facilities, and investigations on behalf of nineteen (19) licensing boards overseeing certain professions. She also manages the State's efforts to prevent fraudulent receipt of public assistance and to recoup fraudulently obtained funds and overpayments. Dishman is a supervisory employee, directly or indirectly supervising forty-nine (49) full-time employees and one part-time employee and serving as a management official in the grievance process. She also oversees legal services provided to her division by assistant attorney generals. Dishman prepares, coordinates and monitors a budget exceeding 4.5 million dollars.

Dishman directly reports to DIA Director Roberts. She admitted at hearing that her work requires her to deal with confidential information and she has a confidential relationship with the Director where she has a duty not to disclose confidential information they discuss. Dishman believes all DIA employees have a confidential relationship with some member of the DIA management team due to the DIA's investigative duties relating to personnel and health care issues.

Prior to accepting the position as Administrator for the Investigations Division, Dishman verified with the then current DIA director that the position was merit covered. This was important to Dishman because she did not want to be concerned about her job being at risk each time there was a change in director. She also believes merit protection is important for the integrity of the Investigations Division. She believes merit protection for employees helps “maintain the Investigations Division as an independent, autonomous division that is not subject to any kind of political influence.”

Appellant James Smith has worked for the DIA since the department’s creation in 1986. Prior to his current position he worked for the department as a Field Investigator and a Bureau Chief. Since 2006 he has been the Assistant Division Administrator for the Investigations Division and as the Bureau Chief of the Economic Fraud Control Bureau. His position description questionnaire describes his job responsibilities in part as:

Manages, cooperatively and collaboratively, investigations related to Medicaid Provider fraud, exploitation of Medicaid recipients, public assistance eligibility fraud, trafficking of food assistance, professional licensing and the collection of public assistance debt. Maintains familiarity with the other areas of the Division to be able to assume oversight and maintain smooth operations of the entire division in the absence of the Administrator. Assists in coordinating and timeliness of investigations involving multiple state, local and/or federal agencies. Assures that state and federal requirements and procedures involving authorized investigations, collection of debt and other enforcement actions are appropriately implemented.

Smith is also responsible for civil and criminal investigations for seven Department of Human Services programs including the Family Investment Program, Title XIX, Electronic Benefit Transfer, Food Stamp Eligibility,

Divestiture, Child Care and HawkI. He also oversees some investigations for Housing and Urban Development programs. He works with county attorneys, U.S. attorneys, Social Security Investigators, Office of Inspector General Agents, U.S. Marshalls, and Medicare Investigators to determine when to pursue, settle and withdraw cases. Smith testified that he directly supervises approximately thirty (30) employees.

Smith directly reports to Wendy Dishman, the Division Administrator for the Investigations Division. At hearing Smith admitted that he is part of the management team for the Division and that he has regular access to confidential information and has a duty not to disclose that confidential information to others outside of the Division. He also noted that Iowa Code section 10A.105 addresses the confidentiality of information gathered in the course of investigations.

Smith accepted his position with the understanding that the position would be merit covered. He believes it is important for his position to have merit protections

because of the type of work that we do. We conduct investigations on various programs and in various areas. I think it's crucial that they have to remain impartial - independent, impartial investigations and investigations based strictly upon the facts when we are conducting them, but not under the influence of a person or a political influence.

Appellant Dawn Fisk has worked for the DIA since 1995. Prior to her current position she worked for the Department as a Health Facilities Surveyor, Program Coordinator and Bureau Chief. Since December of 2010 she has been the Division Administrator for the Health Facilities Division of the DIA. Fisk's

position description questionnaire was not submitted as an exhibit at the hearing but Fisk described her work as follows:

The responsibilities of the division are for the regulation, licensure and certification activity of licensed and certified healthcare facilities in the State of Iowa. That involves anything from small three-bed group homes to large acute care hospitals, and pretty much everything in between.

Probably the only things we don't regulate that people typically think of when they think of healthcare [are] physicians clinics. But other than that, hospitals, nursing homes, ambulatory surgical centers, many group homes or residential care facilities, intermediate care facilities to intellectually disabled. We regulate all of those. Many of those programs for the federal government, all of them for state purposes as well.

My specific duties are to oversee the general operations of the division. I have six direct reports and probably close to a hundred indirect reports. I oversee many of the more difficult or complicated regulations, both federal and state.

Fisk directly reports to DIA Director Roberts and is part of the management team for the Health Facilities Division. At hearing she admitted that she has regular access to confidential information both relating to programs and personnel. She also noted that she has had regular access to confidential information in all of the prior positions she has held at the DIA. Although her position description questionnaire does not describe her duty not to disclose confidential information, and the director has never told her that she has this duty, she understands this to be part of her job duties and maintains the confidentiality of information that should not be disclosed to others.

When Fisk accepted her position the former DIA director told her that the position would be merit covered. She believes that "it's important that these regulatory positions are merit covered so that they are not subject to whatever

the political whims of the day may be.” She also believes merit status for employees of the Division is required to maintain federal funding for some programs.

Appellant Kathy Sutton has worked for the DIA since the department’s creation in 1986. Prior to her current position, she has worked for the Health Facilities Division of the DIA as a Compliance Officer, Program Coordinator and Bureau Chief. She has been the Assistant Administrator of the Health Facilities Division since November 2005. In this position she assists the Division Administrator in overseeing the licensure and certification of healthcare entities including hospitals, nursing homes, end stage renal disease, ambulatory surgical centers, among others. In this role, according to her position description questionnaire, Sutton is responsible for assuring timeliness of surveys and complaint investigations, monitoring the consistency of state and federal surveys, and assuring appropriate implementation of state and federal requirements pertaining to disputed deficiencies, fines, citations, civil money penalties and other enforcement actions. Sutton also supervises personnel who conduct compliance investigations of healthcare entities and is involved in taking any personnel action that is required. According to her position description questionnaire, Sutton indirectly or directly supervises twenty-two (22) employees. At hearing she testified that she directly supervises nine (9) employees.

Sutton directly reports to Dawn Fisk, the Division Administrator for the Health Facilities Division who is also an appellant in this proceeding. Sutton

admitted at hearing that she is part of the Division's management team, that she deals with confidential information and that she has a duty not to disclose confidential information she discusses with the Division Administrator. She meets with Fisk daily to discuss ongoing issues and meets with Deputy Director Zylstra and Director Roberts one to two times per week to discuss confidential personnel matters and actions the DIA is pursuing against health care entities, some of which involve confidential information.

Sutton accepted the position of Assistant Division Administrator with the understanding that her position would be merit covered. She believes it is important for her position to have merit protections. She stated,

In my opinion in a regulatory agency it is imperative that there be no undue influence from supervisory personnel based on any kind of political issues. As a regulatory agency we make very unpopular decisions that impact a number of healthcare entities, and those healthcare entities are frequently politically associated. If it wasn't a merit covered position, there is a possibility that as regulators we could be compromised as far as how our decisions are made.

...

The consumers rely on us to oversee the health, safety and security of the healthcare entity in which they are receiving care. If we are not - - if we are in any way compromised in how we carry out that mission, it certainly can negatively impact the consumer.

In 2012, the Department of Administrative Services (DAS) sought to revise the definition of "confidential employee" in section 11—50.1 of the Iowa Administrative Code by following the rule making process outlined in Iowa Code chapter 17A.¹ "Confidential employees" are excluded from merit coverage under Iowa Code section 8A.412(16); thus

¹ There was testimony that DAS had sought to revise the definition through rule making in 2011 but was unsuccessful. DAS re-initiated its effort in 2012.

any employee whose position meets the definition of “confidential employee” in subrule 11—50.1 does not have merit protections provided in Iowa Code Chapter 8A, subchapter IV. Prior to the 2012 rule making process, the rule stated in relevant part,

“Confidential employee” means, for purposes of merit system coverage, the personal secretary of an elected official of the executive branch or a person appointed to fill a vacancy in an elective office, the chair or a full-time board or commission, or the director of a state agency; as well as the nonprofessional staff in the office of the auditor of state, and the nonprofessional staff in the department of justice except those reporting to the administrator of the consumer advocate division.

11 Iowa Admin. Code r. 50.1 (2011). In 2012 DAS sought to amend the definition to state, in relevant part,

“Confidential employee” means, for purposes of merit system coverage, the personal secretary of an elected official of the executive branch or a person appointed to fill a vacancy in an elective office, the chair of a full-time board or commission, or the director of a state agency; as well as the nonprofessional staff in the office of the auditor of state, and the nonprofessional staff in the department of justice except those reporting to the administrator of the consumer advocate division. “Confidential employee” also means an employee who is in a confidential relationship with a director, chief deputy administrative officer, a division administrator, or a similar position, and at the same time is a part of the management team, legal team, or both of said director, chief deputy administrative officer, a division administrator, or similar position. For purposes of this rule, a confidential relationship means a relationship in which one person has a duty to the other not to disclose information.

11 Iowa Admin. Code r. 50.1 (2013) (emphasis added).

In September 2012 DAS was preparing to appear before the Administrative Rules Review Committee about its proposed rule change and needed information about the number of positions that would be affected by

the rule change. To gather this information, DAS instructed its Personnel Officers to advise agencies about the rule change and to work with individual agencies to identify employees who would meet the amended definition of “confidential employee.” First Personnel Officers were instructed to have an internal pre-meeting with others in DAS Human Resources to review organizational charts for each agency and review Iowa Code sections that apply to specific agency employees. Then the Personnel Officer was instructed to have a meeting with individual agency directors to explain the rule change and how to apply the definition of “confidential employee,” and discuss positions that report to the director or other applicable administrators to determine whether each position would meet the revised definition. After the individual agency meetings, the Personnel Officer was to gather information to answer any questions and forward questions or issues on to higher level DAS human resources officials if necessary. Agencies would also be provided a form where they could submit positions “that the department/agency would like considered for exclusion under the expanded definition”

Jodi Driesen was the Personnel Officer assigned to assist DIA with human resource issues and to assist DIA in implementing the rule change. She testified that she had the impression from the work environment that DAS Director Mike Carroll² “tried to make as many people at will as possible.” She did not advise agencies as to who the rule specifically applied to but was a

² Mike Carroll was the DAS Director at the time of the rule making for DAS’s amendment to subrule 11—50.1. Current DAS Director Janet Phipps assumed the responsibilities of this position on April 8, 2014.

resource for explaining and clarifying the rule. She obtained the organizational charts from DIA and believed that DIA seemed to understand the rule change “quite well.” Driesen did not have any formal “pre-meeting” to discuss the rule’s application to DIA employees but recalls having general discussions with other DAS human resource officials about implementing the rule at DIA.

It appears the appellants did not object to the amendment of this rule or submit public comments during the rule making process. It seems the appellants were either not aware that the rule was being amended or believed that the rule, even if amended, did not apply to their positions. DAS followed the rule making process and the rule became effective on December 19, 2012. On January 2, 2013, DAS Director Mike Carroll sent a memo to all department directors with instructions for implementing the rule change. Directors were advised to complete a form identifying the number of positions that would meet the “confidential employee” definition under the revised rule and complete a spreadsheet listing information about employees impacted by the rule change including the employee’s name, job classification, job title, whether he or she was a member of the management or legal team, whether the employee had a confidential relationship to an applicable administrator and if so, the applicable administrator’s name, job classification and job title. The memo suggested that directors follow five steps in identifying employees impacted by the rule:

1. Start at the director level. Identify positions that serve on the director’s management and legal teams.
2. Review the job function/title (e.g., deputy director, division administrator, general counsel, public information officer, legislative liaison, etc.).

3. Determine whether there is an on-going confidential relationship with the director, and whether each position serves on the management or legal team of the director.
4. Repeat steps 1-3 for the deputy, division administrator(s), and board/commission levels.
5. Complete the spreadsheet by documenting the positions identified in steps 1-4 above. Ensure that completed forms are signed by the Director, as required.

On January 29, 2013 DIA Director Roberts submitted the forms to DAS Personnel Officer Driesen. She turned the forms over to DAS human resources official, Chris Peden. Stefanie Pirkl, the Bureau Chief for the Organizational Performance Bureau within DAS, testified that Chris Peden submitted the forms to her. Pirkl reviewed the forms and reviewed any relevant Iowa Code sections that applied to DIA. Pirkl was to identify any legal questions involved and seek counsel from the attorney general's office. After legal questions were resolved, Pirkl submitted the forms to Michelle Minnehan, the DAS Chief Operating Officer, for final approval. The original forms that DIA submitted showed a total of nineteen (19) positions that were "confidential employees" under the revised rule, including the appellants in this case.

At some point between the fall of 2012 and the spring of 2013, DAS became aware of Iowa Code section 10A.104(2), a statute that addressed the merit coverage of DIA employees and could possibly affect the amended subrule's application to DIA employees. Personnel Officer Driesen testified that she learned of the statute when DIA sent her a copy of an Assistant Attorney General's informal advice memorandum from 1996 which addressed whether Iowa Code section 10A.104(2) required DIA employees to be merit covered even if their position was excluded under a specific subsection of Iowa Code section

8A.412. The memorandum was addressed to the general counsel for the Iowa Department of Personnel³ and stated in part,

You have requested my informal advice concerning whether the division administrators of the Department of Inspections and Appeals (DIA) are merit covered. . . . The issue concerning merit coverage of these employees requires an analysis of two apparently conflicting statutes – Iowa Code sections 19A.3(15) [now located at Iowa Code subsection 8A.412(15)] and 10A.104(2).

Chapter 19A [now located at Chapter 8A] establishes the merit system for state employment. Iowa Code section 19A.2A (1995). Section 19A.3 [now located at section 8A.412] provides that “the merit system shall apply to all employees of the state and to all positions in state government now existing or hereafter established” with certain enumerated exceptions. Two of the listed job positions exempt from merit coverage are the chief administrative officer and the division heads of an executive department. Section 19A.3(15) [now subsection 8A.412(15)] provides:

The chief deputy administrative officer and each division head of each executive department not otherwise specifically provided for in this section, and physicians not otherwise specifically provided for in this section. As used in this subsection, “division head” means a principal administrative position designated by a chief administrative officer and approved by the department of personnel or as specified by law.

Chapter 10A establishes DIA. Iowa Code section 10A.102 (1995). Section 10A.104 specifies the powers and duties of the director of the department, including the following:

2. Appoint the administrators of the divisions within the department and all other personnel deemed necessary for the administration of this chapter, except the state public defender, assistant state public defenders, administrator of the racing and gaming commission, members of the employment appeal board, and administrator of the state citizen foster care review board. All persons appointed and employed in the department are covered by

³ The Iowa Department of Personnel no longer exists and responsibilities for state personnel issues are now handled by DAS.

the provisions of chapter 19A [now Chapter 8A], but persons not appointed by the director are exempt from the merit system provisions of chapter 19A [now Chapter 8A].

The memo then explained that the two statutes conflict because although deputy administrative officers and division heads are positions that are generally excluded from merit coverage by Iowa Code subsection 19A.3(15) (what is now subsection 8A.412(15)), section 10A.104(2) “unequivocally states that all employees of the [DIA] appointed by the director are covered by the merit system.” The Assistant Attorney General then applied two rules of statutory construction and concluded that Iowa Code section 10A.104(2) prevailed over what is now subsection 8A.412(15) because it is a more specific statute, directly addressing DIA employees rather than general categories of employees, and because subsection 10A.104(2) had been amended more recently than what is now subsection 8A.412(15). The memo concluded that because of subsection 10A.104(2), the DIA Deputy Director and Division Administrators were merit covered.

After receiving the memo, Personnel Officer Driesen informed Pirkl and Minnehan of it and there was discussion that the Attorney General’s Office should be involved. Driesen was told that Pirkl would handle the issue going forward. Pirkl disagreed with the 1996 memo’s analysis and sought to have DAS’s current Assistant Attorney General review the applicable statutes again.

On April 9, 2013, the DAS Assistant Attorney General issued a memo reviewing and analyzing the 1996 memo and current applicable code sections. The memo quoted current Iowa Code section 10A.104(2) which remains largely

the same as it appeared in 1996, and states that the DIA director as the authority to:

[a]ppoint the administrators of the divisions within the department and all other personnel deemed necessary for the administration of this chapter, except the state public defender, assistant state public defenders, administrator of the racing and gaming commission, members of the employment appeal board, and administrator of the child advocacy board created in section 237.161. *All persons appointed and employed in the department are covered by the provisions of chapter 8A,⁴ subchapter IV, but persons not appointed by the director are exempt from the merit system provisions of chapter 8A, subchapter IV.*

The 2013 memo then analyzed the language of section 10A.104(2), focusing on the legislature's choice of the words that DIA employees are "covered by the provisions of chapter 8A, subchapter IV." The memo noted that the legislature did not specifically state that the DIA employees appointed by the director shall be "merit appointments" or use similar language as it has in other code sections. The memo concluded that the legislature's broad reference to "chapter 8A, subchapter IV as a whole meant that DIA employees "are covered by **all the provisions of chapter 8A, subchapter IV**, including the section 8A.412 exclusions to the merit system." (emphasis in original). The Assistant Attorney General's memo determined the 1996 memo to be an erroneous interpretation of the statutes. The 2013 memo ultimately gave DAS legal support for the position that DIA employees were subject to the exclusions in subsection 8A.412 including the "division administrator" exclusion in subsection 8A.412(15) referenced in the 1996 memo and the "confidential employee" exclusion in subsection 8A.412(16).

⁴ Chapter 8A was formerly chapter 19A.

After receiving the 2013 memo Pirkl confirmed with DAS general counsel that the April 2013 memo reversed the 1996 memo and could be relied on as controlling legal advice. In late June 2013, Pirkl met with DIA management, including Director Roberts, and provided copies of the April 2013 memo. She explained how DAS interpreted the code sections and advised that implementation of the rule change could proceed. After this guidance from DAS, Director Roberts determined who should be exempt from merit coverage under the revised definition of “confidential employee.” Driesen then provided DIA with templates of letters to inform the affected employees.

On July 1, 2013 each of the appellants received a letter stating:

The Department of Administrative Services amended the definition of confidential employee for purposes of merit-system coverage (Iowa Administrative Code r. 11—50.1). Your position is excluded from merit-system provisions in accordance with Iowa Code § 8A.412. Effective July 5, 2013, you will no longer be covered under the merit-system provisions of Iowa Code chapter 8A, subchapter IV.

...

If you believe that your position does not meet the definition of confidential employee under r. 11—50.1, you may appeal the determination in accordance with Iowa Administrative Code ch. 11—61.

After reviewing the spreadsheet and organizational charts submitted by DIA and discussing the applicable statutes and legal memos received from the Attorney General’s Office, on July 2, 2013, DAS Chief Operating Officer Minnehan signed a form giving official approval of the DIA’s list of employees to be removed from merit coverage under the revised definition of “confidential employee.” The form also gave Minnehan’s approval for DIA to retain merit

coverage for one employee originally submitted by DIA as meeting the revised definition of “confidential employee.” DIA and DAS had determined that an Administrative Law Judge on the DIA’s list of affected employees should be removed because another statute specifically stated that “[a]dministrative law judges shall be covered by the merit system provisions of chapter 8A, subchapter IV.” See Iowa Code § 10A.801(3)(a).

On July 18, 2013, the appellants filed non-contract grievances appealing the determination that they were excluded from merit coverage under the revised rule and disagreeing with the April 2013 Assistant Attorney General’s memo. On September 23, 2013, DAS denied the grievance and the appellants filed their appeal at PERB on October 23, 2013. The appellants attached new documentation to their PERB appeal that had not been presented to DAS with the initial grievance. The documentation referenced federal regulations and contracts that the appellants believed required DIA employees to be merit covered.⁵ Around the same time, DIA also obtained information pertaining to

⁵ Because the DIA has agreements with the federal government to monitor health care facility compliance with federal regulations, and to investigate fraud in the receipt of federal benefits, the appellants claimed that some federal regulations or federal contracts may require their positions to be merit covered. For example, the appellants cited a provision in the federal code of regulations that describes intergovernmental personnel program requirements. The regulation states,

(a) The purpose of these regulations is to implement provisions of title II of the Intergovernmental Personnel Act of 1970, as amended, relating to Federally required merit personnel systems in State and local agencies, in a manner that recognizes fully the rights, powers, and responsibilities of State and local governments and encourages innovation and allows for diversity among State and local governments in the design, execution, and management of their systems of personnel administration, as provided by that Act.

(b) Certain Federal grant programs require, as a condition of eligibility, that State and local agencies that receive grants establish merit personnel systems for their personnel engaged in administration of the grant-aided program. These merit personnel systems are in some cases required by specific Federal grant statutes and in other cases are required by regulations of the Federal grantor

federal regulations and contracts that required DIA to have merit systems in place or have merit coverage for its employees.⁶ Specifically, Deputy Director Beverly Zylstra learned that the agreement that DIA had with the Centers for Medicare and Medicaid Services required DIA employees who were performing the work under the contract to be merit covered. Appellant Dishman had also given Deputy Director Zylstra information relating to other federal regulations and the Medicaid State Plan which required merit coverage for certain employees as a condition of receiving federal funding. Deputy Director Zylstra sent this information to DAS and requested a meeting. DAS had several people review the applicable federal regulations and contracts including Stefanie Pirkl and Michelle Minnehan, and the Assistant Attorney General assigned to DAS. Meanwhile, the DIA also had their Assistant Attorney General review the regulations and contracts and determine what DIA employees were impacted by the federal regulations and contracts. DAS also requested DIA contact the Centers for Medicare and Medicaid Services to get clarification on the meaning of “merit covered” for purposes of the federal contracts. Zylstra sent an email to obtain this information from a federal office in Kansas City but never received a response.

On May 2, 2014, Pirkl and DAS Labor Relations Specialist Stephanie Reynolds met with Deputy Director Zylstra, DIA Human Resources Manager

agencies. Title II of the Act gives the U.S. Office of Personnel Management authority to prescribe standards for these federally required merit personnel systems.

³ C.F.R. § 900.601 (2014) (emphasis added).

⁶ It is not clear from the record whether Deputy Director Zylstra discovered this information herself or if appellants notified her of applicable federal regulations and contracts.

Betty Tschetter and the Assistant Attorney Generals for DAS and DIA and discussed the issue. Zylstra recalled the meeting to be very short with DAS requesting that DIA send DAS a list of employees whose salaries were partially covered by federal funding and giving the impression that those positions would be returned to merit coverage. Zylstra recalled that there was no indication that DAS would conduct any further review or that additional DAS approval would be needed. After the meeting, Pirkl emailed Deputy Director Zylstra requesting a specific list of employees within DIA "who are required to be merit-covered pursuant to federal law, regulation, or as a condition of receiving federal funds in an agreement with the federal government." She attached to the email a template letter to notify employees that they would be merit covered again. On May 13, 2014 DIA Director Roberts emailed Minnehan, Pirkl and Reynolds DIA's list of employees who it believed required merit coverage due to federal regulations or contracts. The list included all of the appellants and nearly everyone else listed on the initial spreadsheet DIA submitted when the rule revision was first being implemented. On May 15, 2014, each of the appellants received a letter from Director Roberts which stated in relevant part,

On July 1, 2013, you were notified that you would no longer be covered under the merit-system provisions of Iowa Code chapter 8A, subchapter IV, effective July 5, 2013. This letter serves to notify you that the aforementioned letter is hereby rescinded and withdrawn, effective May 9, 2014.

On Monday, May 19, 2014, Deputy Director Zylstra sent an email to Pirkl inquiring about the status of returning DIA employees to merit coverage. Even

though all of the employees had been informed that their positions were being returned to merit coverage, Zylstra had learned that the necessary DAS “approvals” had not been made in the State’s human resources computer system for some of the employees, including the appellants. Pirkl responded that it was her understanding that DAS Director Janet Phipps⁷ was in contact with DIA Director Roberts concerning the issue.

At that time, DAS Director Phipps and DAS Chief Operating Officer Minnehan were reviewing the May 13 list of employees that DIA submitted and began reviewing the applicable federal regulations and federal contracts. In reviewing the regulations and contracts, Minnehan noted that the documents did not provide a clear answer as to whether merit coverage was required for all of the employees on the list. First, the documents and regulations were presented in somewhat of a piecemeal fashion where Minnehan needed more context to determine when the regulation or contract provision applied. Also, she noted that there were inconsistencies within the regulations and contracts. She explained that there were parts where a regulation or contract made reference to merit coverage as a blanket requirement for all employees. Yet, Minnehan found other regulations or provisions where it seemed as though the contract or regulation allowed for certain exceptions or exemptions from the merit coverage requirement.⁸ In discussing the regulations and contracts,

⁷ Janet Phipps assumed the responsibilities of DAS Director on April 8, 2014. Mike Carroll was the former DAS Director who led the initial rule change and its implementation.

⁸ For example one applicable federal regulation states in part,

Minnehan pointed out to Director Phipps where she believed the contracts or regulations were inconsistent or in conflict.

DAS Director Phipps and Minnehan reviewed the documents and discussed them several times. DAS Director Phipps reviewed the position description questionnaires for the employees on the list and applicable statutory language. She also researched the federal programs DIA was involved in and the merit-coverage regulations for those programs, in addition to reviewing the DIA contract with the Centers for Medicare and Medicaid Services for DIA to administer the federal Medicaid program. In analyzing the position description questionnaires she distinguished the Bureau Chiefs from Assistant Division Administrators. She found that Bureau Chiefs were more closely involved in the investigations and contested cases within the divisions whereas the majority of the work performed by the Assistant Division Administrators was in a managerial and supervisory capacity.

DAS Director Phipps discussed the issue with DIA Director Roberts in mid-May 2014 and several times thereafter and made a recommendation based on her research. The record does not show what exact recommendations Director Phipps made to Director Roberts but Director Phipps testified that she

(a) Sections 900.603–604 apply to those State and local governments that are required to operate merit personnel systems as a condition of eligibility for Federal assistance or participation in an intergovernmental program. Merit personnel systems are required for State and local personnel engaged in the administration of assistance and other intergovernmental programs, irrespective of the source of funds for their salaries, where Federal laws or regulations require the establishment and maintenance of such systems. *A reasonable number of positions, however, may be exempted from merit personnel system coverage.*

5 C.F.R. § 900.602(a) (2014) (emphasis added).

concluded that after taking all of the information and research into account, the federal regulations permitted the State to exempt a reasonable number of positions from merit personnel system coverage without being in conflict with other federal regulations. After receiving DAS Director Phipps's guidance and recommendations, DIA Director Roberts again reviewed which DIA positions required merit coverage due to federal regulations and contracts and which were subject to the merit system exclusion of "confidential employee" in subsection 8A.412(16).

On July 30, 2014 each of the appellants received a letter from DIA Director Roberts which stated in part,

On May 15, 2014, you were notified that your position would be covered under the merit system provisions of Iowa Code chapter 8A, subchapter IV. Since the time of that notification, additional review has occurred and as a result, your position will be excluded from the merit system provisions of Iowa Code chapter 8A, subchapter IV. This letter serves to notify you that the letter dated May 15, 2014, is hereby rescinded.

This letter is your notification that your position meets the definition of confidential employee under r. 11—50.1. As a result, effective July 5, 2013, your position is excluded from merit system provisions in accordance with Iowa Code § 8A.412 and will no longer be covered under the merit-system provisions of Iowa Code chapter 8A, subchapter IV.

...

If you believe that your position does not meet the definition of confidential employee under r. 11—50.1, you may appeal the determination in accordance with Iowa Administrative Code ch. 11—61.

The appellants proceeded with their appeal at PERB and an evidentiary hearing was held on September 25, 26 and October 2, 2014.

CONCLUSIONS OF LAW

The appellants filed their grievances pursuant to Iowa Code section 8A.415(1) which provides in relevant part,

8A.415 Grievances and discipline resolution

1. Grievances

- a. An employee, except an employee covered by a collective bargaining agreement which provides otherwise, who has exhausted the available agency steps in the uniform grievance procedure provided for in the department rules may, within seven calendar days following the date a decision was received or should have been received at the second step of the grievance procedure, file the grievance at the third step with the director. The director shall respond within thirty calendar days following receipt of the third step grievance.
- b. If not satisfied, the employee may, within thirty calendar days following the director's response, file an appeal with the public employment relations board. The hearing shall be conducted in accordance with the rules of the public employment relations board and the Iowa administrative procedure Act, chapter 17A. Decisions rendered shall be based upon a standard of substantial compliance with this subchapter and the rules of the department. Decisions by the public employment relations board constitute final agency action.

.....

Iowa Code § 8A.415(1). This statute “makes it clear that for an employee to prevail in a grievance appeal before PERB, the State’s lack of substantial compliance with some provision of Iowa Code chapter 8A, subchapter IV, or DAS rule must be established.” *Frost & State*, 05-MA-02 at 6 of ALJ decision (PERB 2006).

The issue in this case is whether the appellants have established that the State failed to substantially comply with Iowa Code Chapter 8A, subchapter IV or DAS subrule 11—50.1 when it identified the appellants as “confidential

employees.” The appellants advance several arguments as to how the State did not substantially comply with these provisions. Addressing the issue in this case and the arguments of the parties first requires an understanding of how the subrule’s definition of “confidential employee” interacts with the merit system set forth in Iowa Code chapter 8A, subchapter IV and Iowa Code subsection 10A.104(2) which specifically addresses the employment status of DIA employees.

A. Applicable Statutes and Rules

State employees generally fall into three types of categories: those whose terms of employment are governed by a collective bargaining agreement, those whose terms of employment are governed by the merit system, and those whose employment is “at will.” Iowa Code chapter 8A, subchapter IV is titled “MERIT SYSTEM.”

The general purpose of this subchapter is to establish for the state of Iowa a system of human resource administration based on merit principles and scientific methods to govern the appointment, compensation, promotion, welfare, development, transfer, layoff, removal, and discipline of its civil employees, and other incidents of state employment.

Iowa Code § 8A.411(1). Merit system employees have special protections conferred in Chapter 8A, subchapter IV. In particular, merit employees cannot be “discharged, suspended, demoted, or otherwise receive[] a reduction in pay” unless there is “just cause.” Iowa Code § 8A.415(2); 8A.411(4). The State also cannot discipline or discharge merit employees for reasons relating to the person’s political ideologies, religion, race, national origin, sex or age. Iowa Code § 8A.415(2)(b). Iowa Code section 8A.412 provides that “[t]he merit

system shall apply to all employees of the state and to all positions in state government now existing or hereafter established.” The section then sets forth twenty-four (24) exclusions describing employees that are not within the merit system. Two exclusions are relevant to this case. Iowa Code section 8A.412 provides,

However, the merit system shall not apply to the following:

(15) The chief deputy administrative officer and each division administrator of each state agency not otherwise specifically provided for in this section As used in this subsection, “division administrator” means a principal administrative or policymaking position designated by a chief administrative officer and approved by the director or as specified by law.

(16) All confidential employees.

Iowa Code § 8A.412(15), (16). Under subsection (15), appellants Dishman and Fisk are excluded from the merit system because they are Division Administrators of DIA. However, throughout their employment as Division Administrators, they have been retained in the merit system because the 1996 assistant attorney general memo advised that Iowa Code section 10A.104(2) supersedes the exclusion in 8A.412(15). Iowa Code section 10A.104(2) provides that the DIA director or the director’s designee shall

2. Appoint the administrators of the divisions within the department and all other personnel deemed necessary for the administration of this chapter, except the state public defender, assistant state public defenders, administrator of the racing and gaming commission, members of the employment appeal board, and administrator of the child advocacy board created in section 237.16. All persons appointed and employed in the department are covered by the provisions of chapter 8A, subchapter IV, but persons not appointed by the director are exempt from the merit system provisions of chapter 8A, subchapter IV.

Iowa Code § 10A.104(2) (emphasis added). The 1996 Assistant Attorney General memo concluded that this subsection superseded the exclusion of subsection 8A.412(15) in part because subsection 10A.104(2) was a more specific statute, directly addressing the employment status of DIA employees, rather than the general “division administrator” exclusion in subsection 8A.412(15). Therefore, all DIA employees who were appointed or employed by the DIA director, including the Division Administrators were deemed to be within the merit system and have merit system protections.

As noted above, Iowa Code subsection 8A.412(16) excludes “confidential employees” from the merit system. “Confidential employee” is not defined in Iowa Code chapter 8A, subchapter IV. Instead, DAS has defined “confidential employee” in its administrative rules implementing Iowa Code Chapter 8A, subchapter IV. The definition of “confidential employee” is at issue in this case and set forth in administrative subrule 11—50.1.

Although the appellants’ positions have always required them to handle confidential information and have confidential relationships with the DIA Director or other DIA Division Administrators, historically their positions have not been deemed to be excluded from merit coverage under the “confidential employee” exclusion for two reasons. First, under the analysis of the 1996 Assistant Attorney General memo, Iowa Code section 10A.104(2) specifically addressing DIA employees superseded any exclusions in subsection 8A.412 including the general “confidential employee” exclusion in subsection 8A.412(16). Second, the appellants positions did not fall within the definition

of “confidential employee” as the term was defined prior to DAS’s amendment of the subrule in 2012.

Prior to the amendment, the definition of “confidential employee” for purposes of exclusion from merit coverage only applied to secretarial and nonprofessional staff.⁹ The 2012 amendment defined “confidential employee” much more broadly. The amended definition still includes certain secretarial and nonprofessional staff but also includes any

employee who is in a confidential relationship with a director, chief deputy administrative officer, a division administrator, or a similar position, and at the same time is a part of the management team, legal team, or both of said director, chief deputy administrative officer, a division administrator, or similar position. For purposes of this rule, a confidential relationship means a relationship in which one person has a duty to the other not to disclose information.

11 Iowa Admin. Code r. 50.1. DAS and DIA Director Roberts determined the appellants met the revised definition because the appellants’ positions required that they not disclose certain information they discussed with either the DIA Director or a DIA Division Administrator and each was considered part of the DIA Director’s management team. DAS and DIA did not use the reasoning from the 1996 Assistant Attorney General memo in applying the revised definition of “confidential employee” to the DIA employees. Instead, DAS

⁹ Prior to DAS’s amendment of the definition in 2012, subrule 11—50.1 stated,

“Confidential employee” means, for purposes of merit system coverage, the personal secretary of an elected official of the executive branch or a person appointed to fill a vacancy in an elective office, the chair or a full-time board or commission, or the director of a state agency; as well as the nonprofessional staff in the office of the auditor of state, and the nonprofessional staff in the department of justice except those reporting to the administrator of the consumer advocate division.

sought advice from the current DAS Assistant Attorney General who advised that Iowa Code subsection 10A.104(2) did not conflict with or supersede the merit system exclusions under section 8A.412 and therefore DIA employees are covered by all provisions of 8A, subchapter IV, including the section 8A.412 exclusions and specifically the “confidential employee” exclusion. Because the appellants were determined to be “confidential employees” within the meaning of amended subrule 11—50.1, they became subject to the exclusion to the merit system under section 8A.412(16).

The appellants’ post-hearing brief asserts several arguments to support its claim that the State did not substantially comply with Iowa Code Chapter 8A, subchapter IV and Iowa Administrative Code 11—50.1 when it determined the appellants were “confidential employees” and therefore no longer merit employees. The appellants generally contend the State did not substantially comply with these provisions by (1) failing to serve the intent and objectives of Iowa Code section 8A.412 and administrative rule 11—50.1 in its adoption and application of the revised definition of “confidential employee,” (2) failing to adequately consider other statutes, federal regulations or contracts when implementing and applying the revised definition, and (3) failing to implement or apply the revised definition consistently or fairly. I will consider each argument in turn.

B. Intent and Objectives of Iowa Code section 8A.412 and Rule 11—50.1

First, the appellants contend that the State did not substantially comply with Iowa Code subsection 8A.412 or administrative rule 11—50.1 because

when adopting and applying the revised definition, the State “failed to carry out the intent for which [they were] adopted.” In interpreting “substantial compliance,” PERB has cited the following definition from the Supreme Court:

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

Frost & State, 07-MA-04 at 5 of ALJ decision (PERB 2006) (quoting *Brown v. John Deere Waterloo Tractor Works*, 423 N.W.2d 193, 194 (Iowa 1988)). In this case, I must determine whether the State has complied “in respect to the substance essential to every reasonable objective of” Iowa Code subsection 8A.412(16) and DAS subrule 11—50.1. I am to look at the facts and analyze whether the statute and subrule have “been followed sufficiently so as to carry out the intent for which” the statute and subrule were adopted.

Iowa Code section 8A.411(1) sets forth the overall objective of Iowa Code chapter 8A, subchapter IV. It states that

[t]he general purpose of this subchapter is to establish for the state of Iowa a system of human resource administration based on merit principles and scientific methods to govern the appointment, compensation, promotion, welfare, development, transfer, layoff, removal, and discipline of its civil employees, and other incidents of state employment.

Iowa Code § 8A.411(1). Iowa Code section 8A.412 explains that the merit system is to apply to all employees and then sets out categories of employees that are excluded from the merit system. Iowa Code § 8A.412. The plain

language of section 8A.412(16) shows that the legislature's purpose in adopting this subsection was to make clear that "All confidential employees" should be excluded from the merit system.¹⁰ However, the legislature chose not to define "confidential employee" and left this discretion to the Department of Personnel, which is now DAS.¹¹ The logical objective of subrule 11—50.1 thus is to define "confidential employee" for purposes of the merit exclusion set out in subsection 8A.412(16).

The appellants contend that the State has failed to explain the purpose of the rule amendment and that the rule was only revised to accomplish former DAS director Mike Carroll's alleged objective to make as many employees at will as possible. DAS Personnel Officer Driesen testified that the working

¹⁰ The "confidential employee" exclusion did not exist until the legislature re-wrote the merit system exclusions in 1986. See 1986 Iowa Acts 468 (amending Iowa Code § 19A.3, the former section containing the merit system exclusions). Prior to the legislature's 1986 amendment of the exclusions, some confidential employees were excluded under section 19A.3(3) which provided that the following employees were not covered by the merit system:

1. Three principal assistants or deputies for each elective official and one stenographer or secretary for each elective official and each principal assistant or deputy thereof, also all supervisory employees and their confidential assistants.

Iowa Code § 19A.3(3) (1985) (emphasis added). The 1986 amendment eliminated this subsection but added a general "confidential employee" exclusion. See Iowa Code § 19A.3 (1987).

¹¹ After the legislature's addition of the "confidential employee" exclusion, the Department of Personnel, now DAS, initially defined "confidential employee" as

"Confidential employee" means, for purposes of merit system coverage, the personal secretary of: an elected official of the executive branch or a person appointed to fill a vacancy in an elective office, the chair of a full-time board or commission, or the director of a state agency; as well as the nonprofessional staff in the office of the auditor of state, and the nonprofessional staff in the department of justice except those reporting to the administrator of the consumer advocate division.

See 581 Iowa Admin. Code r. 1.1 (1998).

environment under former director Carroll gave her the impression that he wanted to make “as many people at will as possible.” Other objectives of the amended subrule were also presented at hearing. Michelle Minnehan testified that there were several purposes for revising the “confidential employee” definition, including to address concerns that the Administrative Rules Review Committee had expressed in 1986 when the legislature first adopted the “confidential employee” exclusion, to provide clarity on the meaning of “confidential employee,” and amend the definition to give agencies flexibility in identifying who were “confidential employees.” Minnehan’s testimony is corroborated by previous rule making documentation and minutes from an Administrative Rules Review Committee meeting where DAS’s proposed amendment to the “confidential employee” definition was reviewed.¹²

¹² When “confidential employee” was first defined in 1986 as only applying to the personal secretary of an elected official, a full-time board or commission, or an agency director, and non-professional staff of the auditor’s office and the department of justice, the Administrative Rules Review Committee filed an objection, noting that this definition was too narrow. In particular the objection stated,

In the committee’s opinion this definition is too narrow and should be broadened to include the secretary of the deputy official and the secretaries of the division heads.

. . .

The committee believes that the re-write of section 19A.3 [the precursor to 8A.412] was intended to reduce the number of automatic exemptions . . . and to vest in the Personnel Department [now known as DAS] authority to create exemptions as needed in particular situations.

See 11 Iowa Admin. Code r. 50.1, p. 6 (Jan. 21, 2004). From 1986 until 2012, the objection was noted and published in the administrative code next to the rule. During the 2012 rule making process amending “confidential employee,” DAS representatives advised the committee that the rule was being amended to address the above objection. In fact, during this meeting the Administrative Rules Review Committee voted to lift the longstanding objection. See Minutes of October 9, 2012 Administrative Rules Review Committee Meeting p. 7. DAS representatives for the rule making, Caleb Hunter and Michelle Minnehan provided the following testimony before the Administrative Rules Review Committee about the amendment’s purpose:

DAS's application of the revised definition of "confidential employee" to the appellants served all of the above purposes. First, if one objective was to increase the number of "at will" employees, excluding the appellants and others from merit coverage through a broader definition of "confidential employee" certainly served that objective. The broader definition also served the purposes identified by Minnehan. The revised definition addresses the Administrative Rules Review Committee's longstanding objection that the legislature intended the general "confidential employee" exclusion to be broader than originally defined by the Department of Personnel and was intended "to vest in the Personnel Department [now known as DAS] authority to create exemptions as needed in particular situations." See 11 Iowa Admin. Code r. 50.1, p. 6 (Jan. 21, 2004). By defining "confidential employee" in terms of how the position relates to higher administrative positions and an employee's job responsibilities rather than by specific job title, agencies and DAS have more flexibility to categorize positions as "confidential employees" when each State agency operates with a unique organizational structure and management style.

Mr. Hunter stated that the amendment is intended to ensure that employees engaged in policy making are properly classified. Ms. [Minnehan] added that the two-part definition provides for proper classification in that the employee is in a confidential relationship with a top-level administrator and is part of that administrator's management team, and she noted that, because agencies function differently, the definition allows decisions about reclassification of employees to be made on an agency-by-agency basis. Mr. Hunter stated that the definition clarifies for employees who have confidential relationships, in some cases with political appointees, the requirement not to disclose confidential information and that the number of state employees who will be affected is unknown.

See Minutes of October 9, 2012 Administrative Rules Review Committee Meeting.

The overall implementation of the revised subrule also served these purposes. DAS did not single out agencies for applying the new definition and instead requested organizational charts and spreadsheets for all agencies to identify how many employees would fit within the new definition. This served the purpose of ensuring that the State was identifying all employees that could meet the new definition of “confidential employee” and thus increased the number of at will employees. The implementation plan also gave clarity to the meaning of “confidential employee” for agencies by setting out specific requirements that must be met for the definition to apply. It asked each agency to update and review organizational charts and carefully evaluate which employees, (1) reported to the agency director, deputy director or division administrator, (2) was a part of the management or legal team, and (3) had a duty not to disclose confidential information. Again, the implementation plan also offered flexibility responsive to an agency’s organizational structure and management style since the revised definition identified confidential employees based on each employee’s role in the agency rather than job title.

At the heart of the appellants’ argument is their disagreement with DAS’s motives and policy reasons for broadening the definition of “confidential employee.” But under a proper substantial compliance analysis, PERB does not evaluate the merit or value of the policies behind any DAS rule or statute within Iowa Code chapter 8A, subsection IV. Instead, PERB looks to whether the State has substantially complied with the literal terms of an applicable statute or subrule and whether it has substantially complied with the identified

purposes and objectives of the applicable rule or statute, without regard to whether PERB agrees or disagrees with those objectives.

Such broad judgments about the effectiveness of an agency in carrying out its general functions, and about whether those results are to be deemed sufficient or not, are for the legislature or chief executive to make. PERB's role, instead, is to determine whether the State has substantially complied with a relevant statute or rule's actual requirements.

Frost & State, 05-MA-02 at 13 of ALJ decision (PERB 2006).

In applying the revised definition of "confidential employee" to the appellants, the State substantially complied with the subrule. Each appellant admitted that they had a duty not to disclose confidential information and were in a confidential relationship and reported to either the DIA Director or a DIA Division Administrator. Each appellant admitted they were a part of the DIA management team. Each appellant essentially admitted that their positions fell within the revised definition of "confidential employee." Thus, the State substantially complied with the literal terms of Iowa Code section 8A.412(16) and subrule 11—50.1 and, as explained above, substantially complied with the purpose and objectives of these provisions. For these reasons, I conclude that the State's implementation and application of the revised definition of "confidential employee" substantially complied with Iowa Code section 8A.412(16) and Iowa Administrative Code subrule 11—50.1.

C. Other Statutes, Regulations or Contracts

The appellants next contend that the State did not substantially comply with subrule 11—50.1 when it failed to adequately consider other statutes, federal regulations or contracts when implementing and applying the revised

definition of “confidential employee.” They note that in implementation DAS did not request agencies to provide information about potential conflicts between the amended subrule and other statutes, regulations or contracts that may impact application of the amended definition of “confidential employee.” Instead, DAS reviewed other applicable Iowa Code sections on its own and made no inquiry into whether federal regulations or contracts affected application of the subrule to DIA or other agencies’ employees. Appellants also believe that DAS incorrectly interpreted Iowa Code section 10A.104(2) and urge that DAS’s interpretation should not be given deference because it has not been granted interpretive authority over Iowa Code chapter 10A.

DAS did review other applicable statutes, regulations and federal contracts. Pirkl testified that she was aware that Iowa Code section 10A.104(2) was a statute that addressed the merit status of DIA employees. The evidence showed that DAS knew of this statute, sought legal advice on it, and discussed its legal implications with DIA during the implementation process. DAS also evaluated applicable federal regulations and contracts when it learned of their existence. The federal regulations and contracts were not ignored but were reviewed several times by both DAS Chief Operating Officer Minnehan and DAS Director Phipps and discussed with DIA Director Roberts. Certainly in hindsight it may have been more efficient if DAS requested agencies to alert them to any potential conflicts with statutes, regulations or federal contracts. But the fact that some information was only reviewed later in the process does not mean the State failed to substantially comply with Iowa Code Chapter 8A,

subchapter IV or administrative subrule 11—50.1 in its implementation or application of the revised definition of “confidential employee.”

At the core of appellant’s argument is their disagreement with DAS’s interpretation of Iowa Code section 10A.104(2). They believe that Iowa Code section 10A.104(2) requires their positions to be merit covered regardless of whether the appellants meet an exclusion under Iowa Code section 8A.412 and therefore application of the revised definition of “confidential employee” to their positions is invalid. As discussed in the findings of facts, there have been inconsistent legal opinions offered as to the meaning of Iowa Code section 10A.104(2). The appellants may have a convincing argument that Iowa Code section 10A.104(2) prohibits them from being excluded as “confidential employees” but whether PERB agrees or disagrees with the legal analysis in either the 1996 or 2013 Assistant Attorney General memos is not relevant to this case. *See Manternach & State*, 89-MA-04, 89-MA-05, 89-MA-06 at 15 (PERB 1991) (noting that an attorney general’s interpretation of a related statute was not relevant to PERB’s jurisdiction to determine whether the State conformed with the law and rules applicable in a PERB proceeding). This claim must be raised in district court¹³ and cannot be addressed at PERB. PERB’s jurisdiction is solely limited to determining whether the State substantially complied with Iowa Code Chapter 8A, subchapter IV and DAS rules. *See Iowa*

¹³ Invalid rules may be challenged in district court. *See* Iowa Code § 17A.2(2) (defining “agency action” to include an “agency rule.”); § 17A.19 (permitting parties to seek judicial review when aggrieved by “agency action.”); *Barker II v. Iowa Dep’t of Transp.*, 431 N.W.2d 348 (1988); *Motor Club of Iowa v. Iowa Dep’t of Transp.*, 251 N.W.2d 510 (Iowa 1977); *Stratton & State*, 93-MA-13 at 9 (PERB 1995) (stating “The appropriate procedure to challenge the validity of administrative rules would be prior to their enactment, through § 17A.4 of the Iowa Code, or subsequently, through a declaratory judgment action in district court . . .”).

Code § 8A.415(1)(b). PERB has no authority to determine whether DAS rules or DAS's application of its rules violate any other code provision. *See Stratton & State*, 93-MA-13 at 8-9 (PERB 1995) (rejecting a grievant's claim that a DAS rule conflicted with a statute and noting that PERB has no authority to determine the validity of rules).

D. Consistent and Fair Application of Subrule 11—50.1

The remaining arguments of the appellants pertain to whether the State's application of subrule 11—50.1 was consistent and fair. They complain that their position description questionnaires were not reviewed in the initial determination of whether they met the revised definition of "confidential employee." They believe DAS was inconsistent in applying the rule when it advised agencies in its Frequently Asked Questions (FAQ) implementation document that the section 8A.412 exclusions would be analyzed in conjunction with other statutes that may specifically address the merit coverage of certain positions, functions or agencies, yet in applying the subrule to the appellants, DAS determined section 10A.104(2) did not apply even though this statute had been construed to apply to the appellants' positions for many years. At hearing the appellants noted that DAS approved another DIA employee to retain merit coverage under a nearly identical statute. They urge that DIA gave the impression that the appellants (and others) would be returned to merit status due to requirements of federal regulations and federal contracts but then decided to review the positions again and decided the appellants would not be returned to merit status. They contend that DAS did not inform employees of

the standards it would use in applying the new subrule and did not inform the appellants of how it determined that they met the definition of “confidential employee” despite the requirement set forth in Iowa Code section 10A.104(2). At hearing they seemed to argue that because they accepted their positions with the understanding that they would be merit covered, they have a right to expect continued merit coverage unless their job duties change or they consent to a change in employment status.

All of these arguments relate to disagreement with policy about the rule itself or disagreement with DAS’s rule implementation policy rather than whether the State substantially complied with the subrule in applying the revised definition of “confidential employee” to the appellants’ positions. Even if DAS did not apply applicable statutes consistently or fairly, this is a claim that PERB cannot address because the appellants have pointed to no provision of chapter 8A, subchapter IV or DAS rule that was violated by the State’s inconsistent application of the revised definition of “confidential employee.” Also, despite the State’s assurance to the appellants that their positions would remain merit covered, this fact carries no weight in evaluating whether the State substantially complied with section 8A.412(16) or subrule 11—50.1. PERB has no authority to grant relief for unfair or unjust rules. *Callahan & State*, 04-MA-02 at 4 (ALJ 2004). “The fairness of [DAS] rules, like their validity, is beyond [PERB’s] jurisdiction to examine.” *Stratton & Iowa*, 93-MA-13 at 10 (PERB 1995).

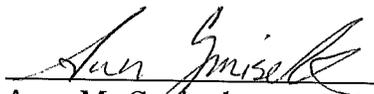
In conclusion, the appellants have failed to establish that the State did not substantially comply with Iowa Code chapter 8A, subchapter IV or DAS subrule 11—50.1 when it determined that the appellants' positions fell within the meaning of the revised definition of "confidential employee" and were therefore excluded from merit coverage under Iowa Code section 8A.412(16). I therefore propose entry of the following:

ORDER

The grievance appeals in case numbers 14-MA-03, 14-MA-04, 14-MA-06 and 14-MA-07 are hereby dismissed.

This proposed decision and order shall become the final decision of the Board unless a timely petition for review is filed within 20 days of the filing of this decision or the Board determines to review this decision on its own motion pursuant to 621—11.7 and 11.8.

DATED at Des Moines, Iowa, this 3rd day of November, 2014.


Ann M. Smisek
Administrative Law Judge

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