

**STATE OF IOWA  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD**

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JOSEPH L. WALSH,  
Appellant,

and

STATE OF IOWA (IOWA WORKFORCE  
DEVELOPMENT),  
Appellee.

Case No. 14-MA-10

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**DECISION ON REVIEW**

This case is before the Public Employment Relations Board (PERB or Board) upon Appellant Joseph L. Walsh’s petition, filed pursuant to PERB rule 621—11.8(19A,20), which seeks the Board’s review of a proposed decision and order issued by a PERB administrative law judge (ALJ) on October 17, 2014. The proposed decision and order ruled on a motion for summary judgment filed by Appellee State of Iowa (Iowa Workforce Development) through which the State sought dismissal of Walsh’s claims. In her proposed decision, the ALJ concluded that no genuine issue of material fact existed and that the State was entitled to judgment as a matter of law. The ALJ proposed granting summary judgment in the State’s favor and dismissing Walsh’s Iowa Code section 8A.415(1) appeal from the prior, adverse ruling of the Iowa Department of Administrative Services.

On January 12, 2015, the Board heard oral arguments on the matter pursuant to rules 621—9.2(20) and 11.8(19A,20). Walsh represented himself

and Teddra Porteous represented the State. Prior to oral arguments, the parties submitted briefs outlining their respective positions.

On review, the Board possesses all powers which we would have possessed had we elected, pursuant to PERB rule 621—2.1(20), to preside at the hearing in the place of the ALJ. Based upon our review of the record before the ALJ, as well as the parties' briefs and oral arguments, the Board agrees with the ALJ's conclusion that there is no genuine issue of material fact and Walsh's appeal fails as a matter of law.

In his brief filed December 29, 2014, Walsh states that he agrees with the summary judgment standard and the "facts and proceedings"<sup>1</sup> set out in the ALJ's proposed decision and order on pages 2 through 8. The State also took no issue with these sections. We adopt these sections as our own and reproduce them here.

### **Summary Judgment Standard**

The State seeks summary judgment pursuant to Iowa Rule of Civil Procedure 1.981. Although PERB is not bound by the rules of civil procedure and has not formally adopted this particular rule, PERB often follows the rules of civil procedure when the agency's rules are silent on a procedural matter. *See, e.g., Giles & State*, 03-MA-15 at 2-3 (PERB 2004); *Riddle & State*, 02-MA-06 at 3 (PERB 2003); *West Des Moines Educ. Ass'n & West Des Moines Cmty. Sch. Dist.*, 81 H.O. 1805 at 8-9 (ALJ 1981). Rule of Civil Procedure 1.981(3) requires granting a motion for summary

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<sup>1</sup> These "facts and proceedings" are not factual findings made following an evidentiary hearing but rather the facts revealed when viewing the record in the light most favorable to Walsh, the non-moving party. Following an evidentiary hearing, an administrative law judge or the Board could very well make factual findings less favorable to Walsh.

judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” “An issue of fact is ‘material’ only when the dispute is over facts that might affect the outcome, given the applicable governing law.” *Frost & State*, 06-MA-01, 06- MA-02, 06-MA-04 at 2 (PERB 2006).

When evaluating a motion for summary judgment,

The moving party is assigned the burden of demonstrating both the absence of any such issue and that [it] is entitled to judgment as a matter of law. When confronted with a motion for summary judgment, the forum is required to examine, in the light most favorable to the party opposing the motion, the entire record before it including the pleadings, admissions, depositions, answers to interrogatories and affidavits, if any, to determine for itself whether any genuine issue of a material fact is generated thereby.

If, upon this examination, the forum determines no such issue is present, and the moving party is entitled to judgment as a matter of law, summary judgment is proper.

*Id.*

### **Facts and Proceedings**

Reviewing the record in a light most favorable to Walsh, the nonmoving party, reveals the following facts.

Walsh began working as the Chief Administrative Law Judge for Iowa Workforce Development’s Unemployment Insurance Division on August 2, 2007. His job was classified as an Administrative Law Judge III. He was given a layoff notice on July 15, 2013. He was ordered to stop working immediately but advised that he would continue to be paid through August 12, 2013. The notice also stated, “You may have recall/outplacement rights. If

you wish to exercise these rights, please review the attached information.”<sup>2</sup>

The State’s Managers and Supervisors Manual outlines the outplacement program. Section 16.20 of the manual states that the outplacement program is designed “to assist non-contract covered employees in finding other state employment prior to or following layoff.” The program “allows a non-contract employee who will be laid off with the opportunity to be placed on outplacement lists for up to two (2) years from the date of layoff.” Managers and Supervisors Manual § 16.20. Under the program, when layoff is anticipated, the employing agency provides the Department of Administrative Services (DAS) a list of employees who are eligible for the outplacement program. *Id.* The laid off employee selects up to fifteen (15) job classes for which the employee is qualified and may list other details such as the counties where the employee seeks to work, whether the employee is available for full-time or part-time hours or specific shifts and the employee's ability to travel. *Id.* When a merit-covered job vacancy occurs, DAS issues an outplacement list to the hiring agency “after the recall list and all other mandatory steps in the hiring process have been cleared.” *Id.* Even though outplacement lists are sent where there is a vacancy, the hiring agency is not required to interview or hire persons from the outplacement list.

On August 13, 2013, Walsh joined the State’s outplacement program. He selected fifteen (15) job classes to be considered for including Administrative Law Judge II (ALJ II), Administrative Law Judge III (ALJ III) and Deputy Workers' Compensation Commissioner.

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<sup>2</sup> The alleged attached information was not made part of the record so it is unclear what information was given to Walsh about his recall and outplacement rights.

In September 2013, the Department of Inspections and Appeals had a vacancy for an ALJ II position and an ALJ III position. The Department of Inspections and Appeals did not open the ALJ II position to all applicants; instead, it was listed as a promotional position where applications could only be submitted by current permanent State of Iowa employees. DAS determined that persons in the outplacement program were not “current State of Iowa employees” and thus were ineligible to apply for the ALJ II position. Therefore, DAS did not send an outplacement list for this vacancy and Walsh was not considered for this position.<sup>3</sup>

Walsh argues that DAS did not properly follow the outplacement protocol in the Managers and Supervisors Manual in filling this position. He disagrees with DAS’s determination that persons in the outplacement program are ineligible to apply for promotional positions. He believes section 16.20 of the Managers and Supervisors Manual requires that a list of outplacement candidates be sent for all vacancies because section 16.20 does not distinguish promotional positions from other vacancies and does not make sending the list discretionary. Section 16.20 states, “The outplacement list will be issued for all merit-covered job vacancies after the recall list and all other mandatory steps in the hiring process have been cleared.” (emphasis added).

The ALJ III position was posted around the same time as the ALJ II position. The Department of Inspection and Appeals opened the ALJ III position to all applicants. DAS sent a list of all applicants for this position to the Department of Inspections and Appeals, which included Walsh’s name as an outplacement

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<sup>3</sup> Even though DAS did not send an outplacement list for this vacancy, it appears at some point the recall and outplacement steps were taken into account. The requisition detail for the ALJ II position, submitted by the State as Exhibit 6, indicates that recall and outplacement lists were “cleared” on September 23, 2013. It specifically states, “**Req notes** 9-23-13 recall/out cleared. dm.”

candidate. Walsh was not interviewed for the position and was not hired. In December 2013, Walsh contacted Jeff Farrell, the hiring authority for the position. Farrell stated that Walsh’s “name was up for consideration” but that he “chose to go with an internal candidate.”

The requisition detail notes for the position indicate that recall and outplacement lists were “cleared” on October 1, 2013.<sup>4</sup> Exhibit 10 also shows that Walsh’s name was forwarded to the Department of Inspections and Appeals as a candidate for the ALJ III position. The exhibit displays a chart listing each candidate’s name, whether they are an internal or external candidate and the candidate’s status:

Select All	Name <sup>5</sup>	Candidate Type	Current HR Status
1		External	Interviewed Not Hired
2		Internal	NQ-Notice Sent
3		External	Interviewed Not Hired
4		External	Interviewed Not Hired
5		Exclusion	Excluded/ Not Used
6		External	Hired
7		External	Considered, Not Interviewed
8		HRE-Entered	Interviewed Not Hired
9		Internal	Considered, Not Interviewed
10		External	Considered, Not Interviewed
11		External	Considered, Not Interviewed
12		External	NQ Sel Notice Sent
13	Walsh, Joseph	Internal	OUT Bypass
14		External	NQ Sel Notice Sent

<sup>4</sup> On Exhibit 5, p. 3 it states, “**Req notes** 10-1-13 recall/out cleared. dm.”

<sup>5</sup> The names of the other applicants have been left out because their identities are not relevant to the issue in this case.

Although Walsh's status listing as "OUT Bypass" does not give guidance on how Walsh was excluded as a candidate, the chart does demonstrate that Walsh was listed as an applicant for the ALJ III position through the outplacement program.

Walsh also argues that DAS did not properly follow the outplacement protocol in the Managers and Supervisors Manual in filling this position. He contends that previously DAS would send a separate list of outplacement candidates to a hiring agency before sending a list of other applicants. The hiring agency would then consider the outplacement candidates before receiving a list of other applicants. He claims that DAS changed how it applied the outplacement program for this position to preclude him from being considered for the position. He seems to claim that since his name was on a list with all applicants, he did not receive full consideration by the hiring agency and thus did not receive the full benefits of the outplacement program.

On October 2, 2013, Walsh filed a non-contract grievance with DAS. Walsh did not complete the section of the grievance form that asked which provision of Iowa Code chapter 8A, subchapter IV, or chapter 70A or DAS rule was violated. Walsh stated the issue as: "The State has failed to follow Outplacement Protocol with regard to two positions posted with the Department of Inspections and Appeals. 12663BR and 12706BR. In both instances the positions were posted for promotional before the outplacement list was issued in violation of Manager Manual 16.20." On November 5, 2013, DAS denied the grievance concluding that Walsh was not entitled to be considered for positions only open to permanent state employees and that hiring agencies did not need to hire candidates from the outplacement list prior to advertising open positions. Walsh filed an appeal from the DAS decision at PERB on November 18, 2013.

In January 2014, the Workers' Compensation Division of Iowa Workforce Development posted an opening for two Deputy Workers' Compensation Commissioners. The posting was open to all applicants. The requisition detail notes for the position state "Requesting all applicants which includes outplacement for Polk County. We are filling two positions." Exhibit 11, p. 3. DAS sent a list of candidates to the agency, which included Walsh's name. Exhibit 13 is a chart similar to that contained in Exhibit 10 but lists the candidates for the Deputy Workers' Compensation positions. Walsh is listed as an "internal" candidate type and his status is listed as "OUT Hired." On January 17, 2013, Walsh was hired as a Deputy Workers' Compensation Commissioner.

For purposes of this decision, we assume without deciding that the State violated section 16.20 of the Managers and Supervisors Manual when filling the ALJ II and ALJ III positions at the Department of Inspections and Appeals.

### **Analysis**

Because there is no genuine issue of material fact, there is no reason to proceed to an evidentiary hearing if Walsh's claims fail as a matter of law. Under Iowa Code section 8A.415(1)(b), the Board shall render decisions on merit grievances "based upon a standard of substantial compliance with this subchapter [subchapter IV of chapter 8A] and the rules of the department [of administrative services]." Consequently, Walsh would need to establish that the State failed to substantially comply with a provision of Iowa Code chapter 8A, subchapter IV, or a rule of the Department of Administrative Services (DAS) in order to prevail on his appeal.

Walsh makes several arguments on his petition to the Board for review of the ALJ's proposed decision and order. First, he argues that section 16.20 of the Managers and Supervisors Manual is a "rule of the department" as contemplated by section 8A.415(1) and therefore summary judgment in the State's favor is not appropriate in this case. Next, Walsh argues that the State violated subsections (14), (15), and (16) of Iowa Code section 8A.413 and DAS rule 11—60.3(6), thus precluding summary judgment for the State. Finally, Walsh argues that his failure to identify section 8A.413 or DAS rule 11—60.3 in the earlier grievance proceedings should not be fatal to his claims on appeal, and therefore this matter should proceed to an evidentiary hearing.

A. Managers and Supervisors Manual section 16.20

Walsh maintains that the State violated section 16.20 of its Managers and Supervisors Manual. Because we assume for the purposes of this decision that the State violated section 16.20, the question is not one of fact but rather whether section 16.20 is a "rule of the department" as contemplated in Iowa Code section 8A.415(1). We agree with the ALJ and conclude that it is not.

A PERB ALJ has previously stated that a violation of a provision of the State's Managers and Supervisors Manual is not a "rule" adopted pursuant to the rulemaking procedures specified in Iowa Code chapter 17A and therefore its provisions are not "rules of the department" as contemplated by section 8A.415(1). See *Callahan & State*, 04-MA-02 at 4, n.1 (ALJ 2004). That ALJ further noted that, while some provisions of the manual may address matters

which are also subject to DAS rules, the provisions themselves are not “rules.”  
*Id.* While the Board has not had the occasion to address this issue, we agree.

Administrative agencies’ practices and procedures are governed in large part by the Iowa Administrative Procedures Act, Iowa Code chapter 17A. DAS is a state administrative agency and is therefore governed by chapter 17A. Section 8A.413 specifically directs DAS to adopt “rules” pursuant to chapter 17A, implying that the legislature intended that the term “rule” be given the same meaning in both statutes. In chapter 17A, “rule” is defined in relevant part as follows:

11. “Rule” means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency. . . . The term includes the amendment or repeal of an existing rule, but *does not include*:

\* \* \*

c. An intergovernmental, interagency, or intra-agency memorandum, directive, *manual*, or other communication which does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof.

Iowa Code section 17A.2(11) (emphasis added). Under this definition, section 16.20 is clearly not a rule as the Managers and Supervisors Manual is an interagency manual that does not substantially affect the legal rights of, or procedures available to, the general public.

Because section 16.20 of the Managers and Supervisors Manual does not constitute a “rule of the department” as contemplated within Iowa Code section 8A.415(1), we are without authority to hear claims based upon violations of it.

B. Iowa Code section 8A.413(14), (15), and (16) and DAS rule 11—60.3(6)

Walsh argues that even if PERB is without authority to address claims regarding violations of section 16.20 of the Managers and Supervisors Manual, he is still entitled to a hearing on the merits of his claims. Before the ALJ, Walsh argued that the State did not substantially comply with subsections (14), (15), and (16) of Iowa Code section 8A.413 by failing to adopt rules governing the outplacement program. On review of the ALJ's proposed decision and order, he additionally argues that the State did not substantially comply with DAS rule 11—60.3(6) by violating the outplacement program outlined in section 16.20 of the Managers and Supervisors Manual.

Section 8A.413 provides in relevant part:

The department shall adopt rules for the administration of this subchapter pursuant to chapter 17A. . . . The rules shall provide:

\* \* \*

14. For reinstatement of persons who have attained permanent status and who resign in good standing or who are laid off from their positions without fault or delinquency on their part.

15. For establishing in cooperation with the appointing authorities a performance management system for all employees in the executive branch, excluding employees of the state board of regents, which shall be considered in determining salary increases; as a factor in promotions; as a factor in determining the order of layoffs and in reinstatement; as a factor in demotions, discharges, and transfers; and for the regular evaluation, at least annually, of the qualifications and performance of those employees.

16. For layoffs by reason of lack of funds or work, or reorganization, and for the recall of employees so laid off, giving consideration in layoffs to the employee's performance record and length of service. An employee who has been laid off may be on a recall list for one year, which list shall be exhausted by the organizational unit enforcing the layoff before selection of an employee may be made from the promotional or nonpromotional list in the employee's classification. Employees who are subject to

contracts negotiated under chapter 20 which include layoff and recall provisions shall be governed by the contract provisions.

Subrule 11—60.3(6) provides in relevant part:

60.3(6) Recall. Eligibility for recall shall be for one year following the date of the reduction in force.

a. The following employees or former employees are eligible to be recalled:

- (1) Former employees who have been laid off.
- (2) Employees who have bumped in lieu of layoff.
- (3) Employees whose hours have been reduced, constituting a reduction in force.

b. Current employees who exercised bumping rights in accordance with subrule 60.3(5) and former employees terminated due to layoff in accordance with subrule 60.3(6) shall only be on the recall list for the class and layoff unit occupied at the time of the reduction in force.

c. The following provisions shall apply to the issuance and use of recall lists:

- (1) Recall lists shall be issued for merit system covered positions and contract-covered positions only.
- (2) When one or more names are on the recall list for a class in which a vacancy exists, the agency must fill that vacancy with a former employee from that list. If no one from a recall list is selected, the agency shall justify that decision to the director before the position may be filled by other methods.
- (3) The recall alternatives in (2) above must be exhausted before other eligible lists may be used to fill vacancies.

Walsh's claims that the State did not substantially comply with subsections (14), (15), and (16) of Iowa Code section 8A.413 and DAS rule 11—60.3(6) must be dismissed because he did not raise them in his initial grievance to DAS. Well-established precedent holds that an appellant may not

raise claims for the first time on appeal to PERB in a case brought pursuant to Iowa Code section 8A.415(1). *See, Teigland & State*, 03-MA-10 (PERB 2004); *Cooper v. State*, 97-MA-12 (PERB 1998).

Walsh suggests, however, that his citation to section 16.20 of the Managers and Supervisors Manual should have provided adequate notice of his claims that the State violated section 8A.413, subsections (14), (15), and (16) and DAS rule 11—60.3(6) even though he did not specifically cite them in the grievance proceedings below. PERB has historically construed filings broadly, focusing on the substance of the employee's claims rather than on whether the employee has clearly articulated what sections of chapter 8A, subchapter IV or DAS rules were violated. *See Frost & State*, 06-MA-01, 06-MA-02, 06-MA-04 at 13-14 (PERB 2006). Strict adherence to the technical rules of pleading is not required. *Id.* If the substance of the initial grievance provides adequate notice of the nature and basis of the grievance, the failure to cite a specific section of chapter 8A, subchapter IV or a DAS rule is not fatal to the claim. *See, e.g., Steinbronn & State*, 06-MA-07 at 10-11 (PERB 2008) (concluding that the State had adequate notice of the basis of the grievant's claims where the manual provision cited in the initial grievance mirrored the language of a DAS rule).

The crux of Walsh's argument is that the outplacement program is the equivalent of "recall." While both apply to laid-off employees, the State has treated recall and the outplacement program as wholly separate processes. *Compare* Managers and Supervisors Manual section 16.20 *with* section 16.25. A non-contract, merit-covered employee is on a recall list only for the class

from which he was laid-off, within the same employing unit. Placement on the recall list is for one year. Individuals recalled to their former position do not have to interview for the vacancy. The outplacement program, on the other hand, allows laid-off employees to choose up to 15 job classes for which they are qualified, whether within their class or employing unit. They remain on the outplacement list for two years. Even though outplacement lists are sent where there is a vacancy, the hiring agency is not required to interview or hire persons from the outplacement list.

As described above, the goal of the outplacement program outlined in section 16.20 of the Managers and Supervisors Manual is “to assist non-contract covered employees in finding other state employment prior to or following layoff.” It does not direct the State to enact rules governing the recall and reinstatement of laid-off employees or a performance evaluation system as Iowa Code section 8A.413, subsections (14), (15), and (16) require. Nor does it outline the procedures for the recall of laid-off employees to their former positions as DAS rule 11-60.3(6) does. Rather, section 16.20 of the manual outlines a wholly separate program from the recall procedures.<sup>6</sup> Thus, a reference to section 16.20 of the Managers and Supervisors Manual in the initial grievance would not provide adequate notice to the State that Walsh based his claims on subsections (14), (15), and (16) of Iowa Code section 8A.413 and DAS rule 11-60.3(6). For this reason, we conclude that Walsh

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<sup>6</sup> Contrast this with section 16.25 of the Managers and Supervisors Manual, which parrots the language found in DAS rule 11-60.3(6).

raised these claims for the first time on appeal to PERB and they are dismissed on this basis alone.

However, as an alternate basis for dismissal, we also conclude that the claims alleging a violation of Iowa Code section 8A.413, subsections (14), (15), and (16) are without merit. Walsh argues that the State did not substantially comply with these subsections because it did not enact rules governing the outplacement program outlined in section 16.20 of the Managers and Supervisors Manual. These subsections direct DAS to adopt rules that provide for the recall and reinstatement of laid-off employees and a performance evaluation system. In response to this statutory directive, DAS adopted rules 11—60.3(6) (setting forth recall rights and procedures for laid-off employees), 11—chapter 62 (setting forth rules for a performance review system for employees), and 11—60.3(3) (outlining the retention points system that should be used in identifying persons to be laid off and including points based on an employee's performance evaluation). Although DAS has not adopted rules for the outplacement program, Iowa Code section 8A.413 subsections (14), (15), and (16) do not specifically direct DAS to adopt rules governing an "outplacement program" or any program to aid laid-off employees in gaining alternate State-employment. Even though Walsh believes there should be rules for the outplacement program, no provision of Iowa Code section 8A.413 subsections (14), (15), or (16) requires this. The State has substantially complied with the subsections by adopting rules concerning reductions in force, performance evaluations, and recall rights.

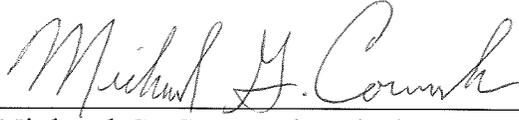
Having considered the entirety of the record and the arguments raised by the parties, whether or not specifically addressed above, we conclude that there is no genuine issue of material fact and Walsh's claims fail as a matter of law. Because the State is thus entitled to prevail as a matter of law, no evidentiary hearing is necessary. Consequently, we enter the following:

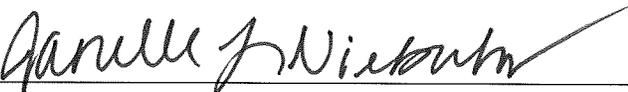
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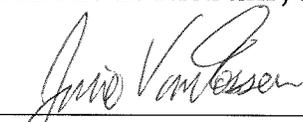
The State of Iowa's (Iowa Workforce Development) motion for summary judgment is GRANTED and Joseph Walsh's grievance appeal is hereby DISMISSED.

Dated at Des Moines, Iowa this 17th day of April, 2015.

PUBLIC EMPLOYMENT RELATIONS BOARD

By:   
Michael G. Cormack, Chair

  
Janelle L. Niebuhr, Board Member

  
Jamie Van Fossen, Board Member

Original filed.

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