

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

JOSEPH L. WALSH,

Petitioner,

vs.

**IOWA PUBLIC EMPLOYMENT
RELATIONS BOARD,**

Respondent,

and

**IOWA DEPARTMENT OF
ADMINISTRATIVE SERVICES,**

Intervenor.

Case No. CVCV049859

RULING ON JUDICIAL REVIEW

On May 15, 2015, Petitioner Joseph Walsh (“Walsh”) filed a Petition for Judicial Review. Walsh filed a Petitioner’s Brief on July 24, 2015. Intervenor Iowa Department of Administrative Services (“DAS”) filed an Intervenor’s Brief in Resistance to Petition for Judicial Review on August 11, 2015. Respondent the State of Iowa, Public Employment Relations Board (“PERB”), filed a Brief of Respondent on August 14, 2015.

This matter came before the Court for a hearing on September 4, 2015. Walsh represented himself. Attorney Matthew Oetker represented DAS. Attorney Diana Machir represented the State of Iowa. Based upon the Court’s review of the certified record and court file, briefs of the parties, and the arguments of counsel, the Court enters the following ruling.

I. FACTS AND AGENCY PROCEDURAL HISTORY

A. Factual Summary

The facts in this case are not in dispute. Walsh was employed as the Chief Administrative Law Judge (“ALJ”) at Iowa Workforce Development from January 7, 2011,

through August 12, 2013. His position was classified as an Administrative Law Judge 3 (“ALJ 3”), and it was a merit position protected by Iowa Code Chapter 8A. *See* Iowa Code Ch. 8A (2015). Under Iowa Code section 8A.413, a merit employee must be hired through the merit process, may only be terminated for cause, and if laid off, has enumerated recall rights. Iowa Code § 8A.413 (2015). Walsh received a layoff notice on July 15, 2013; he was paid through August 12, 2013.

When state employees are laid off, there are two programs available to assist them in getting another job with the State of Iowa: recall and outplacement. The procedure for recall is set forth in rule 11–60.3(6) of the Iowa Administrative Code and section 16.25 of the DAS Managers & Supervisors Manual (“Manual”). *See* Iowa Admin. Code r. 11–60.3(6) (2015); R. at tab 19, p. 14 n.6 (“Decision on Review”) (Neither party submitted the Manual itself for inclusion in the record, nor did Walsh submit the recall/outplacement information that was given to him upon his layoff.). The rule limits recall eligibility to “the class and layoff unit occupied at the time of the reduction in force.” Iowa Admin. Code r. 11–60.3(6)(b) (2015). The rule further states,

- 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.

Iowa Admin. Code r. 11–60.3(6)(c) (2015). The outplacement procedure, however, is described only in section 16.20 of the Manual. *See* R. at tab 19, p. 4 (citing section 16.20 of the Manual).

Outplacement is intended “to assist non-contract covered employees in finding another state

employment prior to or following layoff” and provides “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.” *Id.* When a layoff is anticipated or has occurred, each eligible employee lists up to fifteen job classes for which he or she is qualified and available. *Id.* When a merit job vacancy opens, DAS provides the hiring agency with a list of outplacement candidates “after the recall list and all other mandatory steps in the hiring process have been cleared.” *Id.* The hiring agency is not required to interview or hire from the outplacement list. *Id.*

Once he was laid off, the DAS placed Walsh on the outplacement list on August 13, 2013. In September 2013, two positions, an ALJ 2 and an ALJ 3, opened at the Iowa Department of Inspections and Appeals (“DIA”). Walsh applied for both positions. Since neither position was within the unit Walsh was laid off from, he was ineligible for the recall program. *See* Iowa Admin. Code r. 11–60.3(6)(b). The DIA identified the ALJ 2 position as a promotional position, meaning that applications could only be submitted by permanent State of Iowa Employees. Because the DAS and the DIA did not consider persons on the outplacement list permanent State of Iowa employees, Walsh was not considered for that position. He was, however, considered and rejected for the ALJ 3 position. After asserting to various DAS officials that the relevant rules had not been followed, Walsh filed a grievance.

B. Arguments: Original Grievance Filing

Walsh initiated his grievance by filling out a “Non-Contract Grievance Form.” R. at tab 1. He stated, “[t]he State has failed to follow Outplacement Protocol with regard to two positions posted with the Department of Inspections and Appeals. . . . In both instances the positions were posted for promotional before the outplacement list was issued in violation of Manager Manual 16.20.” *Id.* His requested remedy was that, “[b]oth positions should be taken

down and the outplacement protocol listed in 16.20 should be followed.” *Id.* The form contains a box instructing the user to indicate the “8A Subchapter IV/70A Code Section or DAS-HRE Rule 11 IAC Violated,” and further instructs that the box “[m]ust be completed if other than an 11 IAC 61.2(6) Appeal.” *Id.* (Walsh’s grievance was not an appeal under Iowa Administrative Code r.11–61.2(6). That rule governs appeals of disciplinary actions.) Walsh left the box blank. *Id.* His grievance was denied, and he appealed the decision for review by an ALJ. *Id.* (“State Employee Grievance or Disciplinary Action Appeal Form”).

C. Arguments: Appeal to Administrative Law Judge

On the appeal form, Walsh states the nature of the appeal as, “DAS refused to follow its own protocol regarding Outplacement for non-contract merit employees, thereby denying grievant the opportunity to be considered for two positions for which he is qualified.” *Id.* He asked that the ALJ, “Order DAS and Department of Inspections and Appeals to follow the correct process.” *Id.*

Initially, the State filed a Motion to Dismiss Walsh’s appeal, but that motion was later withdrawn. R. at tabs 2, 3, 4, 6. Once withdrawn, the State filed a Motion for Summary Judgment supported by a Statement of Undisputed Facts. R. at tabs 7, 8. The State claimed that it was entitled to summary judgment because it properly followed the outplacement program procedures and “[t]he undisputed facts . . . undoubtedly establish that the allegations as stated in the complaint, are without merit and no material fact exists which would warrant a continuation of the case.” R. at tab 8 (“Appellee’s Motion for Summary Judgment”). Walsh argued that “there are numerous genuine fact disputes, particularly regarding the ALJ3 position.” R. at tab 10 (Walsh’s “Statement of Disputed Facts & Resistance to Summary Judgment”). The ALJ hearing the appeal granted the State’s motion, applying the summary judgment standard in Iowa

Rule of Civil Procedure 1.981. R. at tab 12 (noting that while not bound by the state rules, the rules are often applied when the agency's rules are silent on a procedural matter); Iowa R. Civ. P. 1.981 (summary judgment is appropriate when “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 the moving party is entitled to judgment as a matter of law”).

The ALJ noted in the Proposed Decision and Order that neither Walsh's original grievance nor his appeal listed any violation of Iowa Code chapter 8A, subchapter IV, or a DAS rule. R. at tab 12. Rather, Walsh asserted that the State had failed to comply with section 16.20 of the Manual, which is not a provision of Iowa Code chapter 8A, subchapter IV, or a DAS rule. *Id.* Walsh did not assert a violation of any statute or rule until his grievance was on appeal. *Id.* (noting that at oral argument and in his supporting affidavit, Walsh alleged violation of Iowa Code § 8A.413(14)–(16) and DAS rule 11–60.3(6)). Walsh appealed the ALJ's decision to PERB. R. at tab 13.

D. Arguments: Appeal to Public Employment Relations Board

On appeal to PERB, Walsh argued: (1) section 16.20 of the Manual is an administrative rule as defined by the Iowa Administrative Procedures Act; (2) if section 16.20 is not a rule, then “DAS has failed to promulgate a rule in violation of Chapter 8A[;]” (3) section 16.20 “is codified by the Iowa Administrative Code and Iowa Code[;]” and (4) his failure to fill in the box on the original grievance form is not a legal basis for summary judgment. R. at tab 17. In response, the State argued that “Walsh's contentions are improper in that they constitute new claims raised for the first time on appeal and even in the event Walsh is permitted to raise new claims on appeal, each is substantively without merit.” R. at tab 18 (“Appellee's Response Brief”). Further, the

State argued that Walsh focused on evolving his arguments rather than showing “that there is a material issue of fact requiring a hearing.” *Id.*

PERB, like the ALJ, agreed with the State, granting the motion for summary judgment and dismissing Walsh’s grievance appeal. R. at tab 19. PERB concluded that without a genuine issue of material fact, Walsh’s claims failed as a matter of law, and since “the State is thus entitled to prevail as a matter of law, no evidentiary hearing is necessary.” *Id.* As a starting point, PERB stated that Walsh’s case started with a grievance governed by Iowa Code section 8A.415(1)(b). *See* Iowa Code § 8A.415(1)(b). Therefore, as a threshold for prevailing on his appeal, Walsh needed to establish “that the State failed to substantially comply with a provision of Iowa Code chapter 8A, subchapter IV, or a” DAS rule. *See id.* PERB found three different ways to dismiss Walsh’s grievance appeal: (1) section 16.20 is not an administrative rule and PERB therefore lacks authority to rule on Walsh’s grievance; (2) Walsh’s claims that the State violated subsections (14), (15), and (16) of Iowa Code section 8A.413 or any portion of DAS rule 11–60.3(6)(c) must be dismissed because he did not raise them in his initial grievance; and (3) “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.” R. at tab 19 p.15. Walsh now petitions this Court for judicial review of PERB’s Decision on Review.

II. STANDARDS OF REVIEW

Chapter 17A of the Iowa Code authorizes judicial review of administrative agency decisions. Iowa Code § 17A.19(1) (2015). Essentially, the district court acts in appellate capacity and “may only interfere with the [agency’s] decision if it is erroneous under one of the grounds enumerated in the statute, and a party’s substantial rights have been prejudiced.” *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006); Iowa Code §17A.19(10). If the court

“determines that the substantial rights of the person seeking judicial relief have been prejudiced” by the agency action, “[it] shall reverse, modify, or grant other appropriate relief from agency action, equitable or legal and including declaratory relief[.]” Iowa Code §17A.19(10). The fourteen ways in which agency action can be prejudicial and the accompanying standards of review are detailed in chapter 17A.19(10) of the Iowa Code. *Id.* at (a)–(n). The “standard of review depends on the aspect of the agency’s decision that forms the basis of the petition for judicial review.” *Burton v. Hilltop Care Ctr.*, 813 N.W.2d 250, 256 (Iowa 2012). Much depends on the authority with which the agency is vested by its enabling statute and whether the issues on appeal are factual, legal, or mixed questions of fact and law (i.e., a challenge to the agency’s ultimate conclusion). *See Meyer*, 710 N.W.2d at 219. Because there are divergent methods of analysis, it is “essential . . . to search for and pinpoint the precise claim of error on appeal” rather than “lumping the fact, law, and application questions together within the umbrella of a substantial-evidence issue.” *Id.*

A. Legal Questions: Iowa Code § 17A.19(10)(c)

If “the claim of error lies with the agency’s interpretation of the law, the question on review is whether the agency’s interpretation was erroneous, and we may substitute our interpretation for the agency’s.” *Meyer*, 710 N.W.2d at 219. The court will give “some degree of discretion” in reviewing legal questions, but will not defer as much as with questions of fact. *Id.* A question of law may be presented “because the [agency] must further determine whether the facts, as determined, support a [legal] conclusion [under a statute]” *Id.* at 218. The court may review questions of law under “other grounds of error such as erroneous interpretation of the law; irrational reasoning; failure to consider relevant facts; or irrational, illogical, or wholly unjustifiable application of law to the facts. *Id.* at 219 (citing Iowa Code § 17A.19(10)(c), (i),

(j), (m)).

When a district court is asked to evaluate an agency's interpretation of law, the standard of review depends on whether the Iowa legislature "clearly vested" the agency with the authority to interpret the statute in question. *Id.* at 256–57; *compare* Iowa Code § 17A.19(10)(c) with Iowa Code § 17A.19(10)(l).

If the agency *has not* been clearly vested with the authority to interpret a provision of law, such as a statute, then the reviewing court must reverse the agency's interpretation if it is erroneous. If the agency *has* been clearly vested with the authority to interpret a statute, then a court may only disturb the interpretation if it is irrational, illogical, or wholly unjustifiable.

Burton, 813 N.W.2d at 256 (internal citations omitted) (emphasis in original). If the legislature did not make an express statement granting or denying interpretative authority to the agency, the court reviews "the precise language of the statute, its context, the purpose of the statute, and the practical considerations involved" to determine whether the interpretation of a statute has been clearly vested in the discretion of the agency." *Sherwin-Williams Co., v. Iowa Dept. of Revenue*, 789 N.W.2d 417 (Iowa 2010) (quoting Arthur E. Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government* 63 (1998)). The inquiry does not focus on the agency's authority to broadly interpret the statute as a whole. Instead, "each case requires a careful look at the specific language the agency has interpreted as well as the specific duties and authority given to the agency with respect to enforcing particular statutes." *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 13 (Iowa 2010).

While it is necessarily a case-by-case determination, the Iowa Supreme Court has recognized a few broad guidelines. *See Renda*, 784 N.W.2d at 12 ("This sort of analysis has not proven conducive to the development of bright-line rules."). The Court noted "that when the statutory provision being interpreted is a substantive term within the special expertise of the

agency . . . [generally] the agency has been vested with the authority to interpret the provisions.” *Id.* at 14. However, “[w]hen the provisions to be interpreted are found in a statute other than the statute the agency has been tasked with enforcing . . . generally . . . interpretive power was not vested in the agency.” *Id.* Finally, if the term or provision being interpreted “has an independent legal definition that is not uniquely within the subject matter expertise of the agency . . . generally. . . the agency has not been vested with interpretative authority.” *Id.* The Iowa Supreme Court relies on indications like “rule-making authority, decision-making or enforcement authority that requires the agency to interpret the statutory language, and the agency’s expertise on the subject or on the term to be interpreted.” *Sherwin-Williams Co., v. Iowa Dept. of Revenue*, 789 N.W.2d 417 (Iowa 2010) (citing *Renda*, 784 N.W.2d at 12–14). Thus, the standard of review on those occasions where the agency has been clearly vested with authority to interpret a statute is much more permissive than the standard of review for those occasions where the agency does not possess the requisite interpretive authority.

B. Mixed Questions of Fact and Law: Iowa Code § 17A.19(10)(m)

If “the claim of error lies with the *ultimate conclusion* reached, then the challenge is to the agency’s application of the law to the facts.” *Meyer*, 710 N.W.2d at 219 (emphasis in original). The reviewing court will be bound by the agency’s factual determination provided that it is supported by substantial evidence, but the court will also “review . . . whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence” such that it acted in an unreasonable, arbitrary, or capricious manner in the application phase. *Id.* Assuming the agency is clearly vested with the authority to interpret the statute at issue, the court will only reverse the agency’s application of law to facts if the agency’s application is “irrational, illogical, or wholly unjustifiable[.]” *See Neal v. Annett*

Holdings, Inc., 814 N.W.2d 512, 519 (Iowa 2012) (explaining that because the agency did not have clearly vested authority to interpret the statute at issue, the court would substitute its own judgment to correct an error of law).

Here, the parties agree that the Court should apply the standard of review described in Iowa Code section 17A.19(10)(c), which allows the court to grant relief if the agency's decision was "[b]ased upon an erroneous interpretation of a provision whose interpretation has not been clearly vested by a provision of law in the discretion of the agency." See Iowa Code § 17A.19(10)(c) (2015). Walsh asserts that the PERB decision is based on an erroneous interpretation of the law and that no deference should be given to PERB's interpretation of the statute. See Iowa Code § 17A.19(10)(c) (2015); see also Pet'r's Br. 2–3. PERB agrees that section 17A.19(10)(c) contains the appropriate standard of review and that the agency has not been clearly vested with discretion to interpret the statute in question. Resp't's Br. 12.

However, PERB also argues that if the agency's ultimate conclusion is being challenged, a different standard of review should apply. Since the agency is vested with the authority to make factual findings, "it follows that the application of the law to those facts is likewise vested by a provision of law in the discretion of the agency." *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 465 (Iowa 2004) (internal citations omitted). Thus, if PERB's ultimate conclusion is also being challenged, PERB asserts that the standard of review under Iowa Code section 17A.19(10)(m) must also be applied, and the Court should review to determine if PERB's ultimate conclusions are "based upon an irrational, illogical, or wholly unjustifiable application of law to fact." See Iowa Code § 17A.19(10)(m). In such a case, "[a] decision is 'irrational' when it is not governed by or according to reason. A decision is 'illogical' when it is contrary to or devoid of logic. A decision is 'unjustifiable' when it has no foundation in fact or reason."

AFSCME Iowa Council 61 v. Iowa Pub. Employment Relations Bd., 846 N.W.2d 873, 878 (Iowa 2014), reh'g denied (June 4, 2014) (internal citations omitted).

Walsh's claim would fail under either standard of review.

III. ANALYSIS

In his petition for judicial review, Walsh waives all but one argument, seeking judicial review only as to whether or not he "is entitled to a hearing to determine whether he should have been reinstated under 11 IAC 60.3(6)(c)." *See* Pet'r's Br. 1; R. at tab 19 p. 9. PERB dismissed Walsh's claim regarding rule 11-60.3(6) because the claim was not raised in the original grievance. R. at tab 19 p.15. Without giving deference to the agency's interpretation of Iowa Code section 8A.415(1)(b), the Court finds that PERB's decision is not based on an erroneous interpretation of the law, nor is it irrational, illogical, or wholly unjustifiable. *See* Iowa Code § 17A.19(10)(c); Iowa Code § 17A.19(10)(m).

PERB discussed this issue at some length. *See* R. at tab 19 pp. 11-15. DAS rule 11-60.3(6) states 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.

Iowa Admin. Code r. 11–60.3(6) (2015).

First, PERB established that in order to prevail, Walsh was required to establish a violation of Iowa Code chapter 8A, subchapter IV or a DAS rule because the original grievance was filed under Iowa Code section 8A.415(1)(b). R. at tab 19 pp. 11. Section 8A.415(1)(b) states, “Decisions rendered shall be based upon a standard of substantial compliance with this subchapter and the rules of the department.” Iowa Code § 8A.415(1)(b). PERB’s interpretation of that provision tracks the statutory language and is not an erroneous interpretation of Iowa Code section 8A.415(1)(b). *See id.* PERB’s reliance on the statutory language also eliminates the possibility of its ultimate conclusion being irrational, illogical, or wholly unjustifiable.

Second, PERB identified that Walsh did not raise his claim regarding rule 11–60.3(6) in his original grievance and that ubiquitous precedent dictates that issues must not be raised for the first time on appeal. R. at tab 19 pp.12–13 (This is, in fact, the same analysis PERB used to eliminate Walsh’s claim regarding subsections (14), (15), and (16) of Iowa Code section 8A.413.) Walsh argues that his reliance on section 16.20 of the Manual in the original grievance was enough to put the State on notice that he alleged a violation of DAS rule 11–60.3(6). His argument necessarily relies on the equivalence of the words “recall” and “outplacement” because rule 11–60.3(6) never mentions the outplacement program. *See* Iowa Admin. Code r. 11–60.3(6).

PERB acknowledges that “strict adherence to the technical rules of pleading is not required,” and had the substance of the grievance been enough to give notice of its nature and

basis, failure to provide a specific citation would not have been fatal to the claim. R. at tab 19 pp.12–13. However, as PERB correctly details, the State of Iowa has treated recall and outplacement as wholly independent processes—the only similarity is that both apply to laid-off workers. *Id.* DAS rule 11–60.3(6) relates explicitly to the recall program, not outplacement. The only place the outplacement program is mentioned is in section 16.20 of the Manual. Given the wholly separate nature of the programs and the absence of any mention of the outplacement program in DAS rule 11–60.3(6), the State’s putative violation could not serve as notice of the necessary violation under Iowa Code section 8A.415(1)(b). PERB’s dismissal of Walsh’s grievance appeal was not based on an erroneous interpretation of the law, nor was it irrational, illogical, or wholly unjustifiable.

Because PERB’s decision to grant the State’s motion for summary judgment and dismiss Walsh’s grievance appeal was not based on an erroneous interpretation of the law, nor irrational, illogical, or wholly unjustifiable, the Court need not reach Walsh’s other contention. However, it is worth noting that PERB’s refusal to apply rule 11–60.3(6) to Walsh is not “inexplicable.” *See* Pet’r’s Br. 3. As established by the facts agreed upon by both parties, Walsh was ineligible for recall with regard to both of the DIA ALJ positions because they were outside the unit from which he was laid off. That means his only recourse was the outplacement procedure outlined in section 16.20 of the Manual. The State of Iowa does not treat the recall and outplacement programs as interchangeable. The DAS and the DIA did not apply rule 11–60.3(6) to Walsh because he was ineligible for it when applying for the DIA ALJ openings. PERB’s interpretation of Iowa Code section 8A.413 subsections (14), (15), and (16) to establish a recall program without relation to the outplacement program described in section 16.20 of the Manual was not erroneous, irrational, illogical, or wholly unjustifiable.

IV. JUDGMENT

IT IS HEREBY ORDERED that Petitioner's request for an Order Remanding the Decision on Review with instructions for a full evidentiary hearing is **DENIED**.

Court costs are taxed to Petitioner.

Dated this 24th day of November, 2015.

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State of Iowa Courts

Type: OTHER ORDER

Case Number CVCV049859
Case Title WALSH V. PUBLIC EMPLOYMENT RELATIONS BOARD

So Ordered

A handwritten signature in cursive script that reads "Robert B. Hanson". The signature is written in black ink and is positioned above a horizontal line.

**Robert B. Hanson, District Court Judge,
Fifth Judicial District of Iowa**