

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

DOUGLAS WISE,)	
Appellant,)	
)	
and)	CASE NO. 100006
)	
STATE OF IOWA (DEPARTMENT OF)	
HUMAN SERVICES),)	
Appellee.)	

RULING ON MOTION TO DISMISS

The State's motion to dismiss this Iowa Code section 8A.415(2) State employee disciplinary action appeal was argued August 7, 2015, Heidi Young for Appellant Douglas Wise and Jeffrey Edgar for the State.

The facts relevant to the State's motion are contained in Wise's appeal and attached documents and are not in dispute. Wise was employed as a Treatment Program Administrator at the Department of Human Services' Glenwood Resource Center when, on October 3, 2014, he received a written statement from Glenwood's superintendent advising him of his disciplinary five-day (paper) suspension and of the reasons for it.

This statement concluded with the following notice:

You may file a grievance in accordance with Chapter 61 of the Department of Administrative Services — Human Resources Enterprise rules if you feel this action was not taken for just cause. These rules state:

Appeal of disciplinary actions. Any non-temporary, noncontract employee covered by merit system provisions who is suspended, reduced in pay within the same pay grade, disciplinarily demoted, or discharged, except during the employee's period of probationary status, shall bypass steps

one and two of the grievance procedure provided for in rule 11–61.1(8A) and may appeal in writing to the director for a review of the action within 7 calendar days after the effective date of the action. The appeal shall be on the forms prescribed by the director. The director shall affirm, modify or reverse the action and shall give a written decision to the employee within 30 calendar days after the receipt of the appeal. The time may be extended by mutual agreement of the parties. If not satisfied with the decision of the director, the employee may request an appeal hearing before the public employment relations board as provided in 11–subrule 61.2(5).

On October 27, 2014, Wise signed a noncontract grievance form alleging the discipline was without just cause, which was received by the Department of Administrative Services (DAS) on October 30. A designee of the DAS director issued an answer to Wise’s appeal on December 3, 2014, denying it on the basis of its untimely filing.

Wise’s disciplinary action appeal was filed with PERB on December 18, 2014, and the State subsequently filed its motion to dismiss the appeal.

Relevant statute and rules

DAS rule 11–60.2(8A) addresses the discipline of State employees and provides, in relevant part:

11–60.2(8A) Disciplinary actions. Except as otherwise provided, in addition to less severe progressive discipline measures, any employee is subject to any of the following disciplinary actions when the action is based on a standard of just cause: suspension, reduction of pay within the same pay grade, disciplinary demotion, or discharge. Disciplinary action involving employees covered by collective bargaining agreements shall be in accordance with the provisions of the agreement. Disciplinary action shall be based on any of the following reasons: inefficiency, insubordination, less than competent job performance, refusal of a reassignment, failure to perform assigned duties, inadequacy in the performance of assigned duties, dishonesty, improper use of leave,

unrehabilitated substance abuse, negligence, conduct which adversely affects the employee's job performance or the agency of employment, conviction of a crime involving moral turpitude, conduct unbecoming a public employee, misconduct, or any other just cause.

60.2(1) Suspension.

b. Disciplinary suspension. An appointing authority may suspend an employee for a length of time considered appropriate not to exceed 30 calendar days as provided in either subparagraph (1) or (2) below. A written statement of the reasons for the suspension and its duration shall be sent to the employee within 24 hours after the effective date of the action.

60.2(6) Appeal of a suspension, reduction of pay within the same pay grade, disciplinary demotion or discharge shall be in accordance with 11—Chapter 61. The written statement to the employee of the reasons for the discipline shall include the verbatim content of 11—subrule 61.2(6).

DAS rule 11—61.2(8A) provides, in relevant part:

11—61.2(8A) Appeals.

61.2(5) Appeal of grievance decisions. An employee who has alleged a violation of Iowa Code sections 8A.401 to 8A.458 or the rules adopted to implement Iowa Code sections 8A.401 to 8A.458 may, within 30 calendar days after the date the director's response at the third step of the grievance procedure was issued or should have been issued, file an appeal with the public employment relations board. A nontemporary, noncontract employee covered by merit system provisions who is suspended, reduced in pay within the same pay grade, disciplinarily demoted, or discharged, except during the employee's period of probationary status, may, if not satisfied with the decision of the director, request an appeal hearing before the public employment relations board within 30 calendar days after the date the director's decision was issued or should have been issued. However, when the grievance concerns allegations of discrimination within the meaning of Iowa Code chapter 216, the Iowa civil rights commission procedures shall be the exclusive remedy for appeal and shall, in such instances, constitute final agency action. In all other

instances, decisions by the public employment relations board constitute final agency action.

61.2(6) Appeal of disciplinary actions. Any nontemporary, noncontract employee covered by merit system provisions who is suspended, reduced in pay within the same pay grade, disciplinarily demoted, or discharged, except during the employee's period of probationary status, may bypass steps one and two of the grievance procedure provided for in rule 11—61.1(8A) and may file an appeal in writing to the director for a review of the action within 7 calendar days after the effective date of the action. The appeal shall be on the forms prescribed by the director. The director shall affirm, modify or reverse the action and shall give a written decision to the employee within 30 calendar days after the receipt of the appeal. The time may be extended by mutual agreement of the parties. If not satisfied with the decision of the director, the employee may request an appeal hearing before the public employment relations board as provided in subrule 61.2(5).

Iowa Code section 8A.415(2) provides:

8A.415 Grievances and discipline resolution.

• • •

2. Discipline resolution.

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

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

may provide other appropriate remedies. Decisions by the public employment relations board constitute final agency action.

Discussion

The State's motion asserts that Wise's PERB appeal must be dismissed because the underlying appeal to the DAS director challenging his suspension was not filed within the seven-day period prescribed by Iowa Code section 8A.415(2)(a) and DAS subrule 11-61.2(6). While not denying that the grievance was not filed within the prescribed time period, Wise asserts that the State's motion should be denied on two grounds – first, because PERB cannot rule on any timeliness issue raised by prehearing motion because the Iowa Code and administrative rules entitle Wise to a hearing on his grievance appeal and second, even if a dispositive prehearing motion is appropriate, any timeliness issue should be deemed waived because the State did not provide him with proper notice of the statute and rule governing grievances.

1. *Absolute entitlement to an evidentiary hearing.* Wise argues that both Iowa Code section 8A.415(2)(b) and PERB subrule 621-11.5(1) provide him with an absolute entitlement to an evidentiary hearing on his appeal to PERB. I am unable to agree with such an absolutist interpretation of the statute and rule.

In construing statutes, courts consider all parts of an enactment together and will not place undue importance on any single or isolated portion. See, e.g., *Miller v. Westfield Ins. Co.*, 606 N.W.2d 301, 303 (Iowa 2000). Consequently, in construing a statute, the court considers the context within

which the words are used. *See, e.g., T & K Roofing Co., Inc. v. Iowa Dept. of Educ.*, 593 N.W.2d 159, 162 (Iowa 1999). In construing a statute, the court seeks to avoid absurd results. *See, e.g., Wesley Retirement Services, Inc. v. Hansen Lind Meyer, Inc.*, 594 N.W.2d 22, 26 (Iowa 1999). Rules of statutory construction apply equally to the interpretation of agency rules. *See, e.g., Iowa Federation of Labor v. Iowa Dept. of Job Service*, 427 N.W.2d 443, 449 (Iowa 1988).

Although acknowledging that the State can eventually assert the untimeliness of his underlying DAS appeal, Wise argues that it cannot be before an evidentiary hearing the merits of his PERB appeal, and bases this assertion primarily upon the sentence in section 8A.415(2)(b) which provides that “[t]he employee has the right to a hearing closed to the public, unless a public hearing is requested by the employee.” Similarly, he points to nearly identical language in PERB subrule 621–11.5(1). Such a construction of the statute and rule places undue importance on an isolated portion of their provisions, takes them out of context, and is susceptible of producing absurd results.

Paragraph “a” of Iowa Code subsection 8A.415(2) provides: A merit system employee, except and employee covered by a collective bargaining agreement, who is . . . suspended . . . may bypass steps one and two of the grievance procedure and appeal the disciplinary action to the [DAS] director within seven calendar days following the effective date of the action.” (Emphasis added). The subsequent section 8A.415(2)(b) provision that on

appeal to PERB from an unsatisfactory response the employee has a right to a closed hearing unless a public hearing is requested, taken in context with the preceding paragraph of the statute, plainly refers to the employee who has appealed the disciplinary action to the DAS director within seven calendar days of the effective date of the disciplinary action. Reading the statute and the PERB rule in the absolutist manner advanced by Wise would produce the absurd result that even where an appeal to PERB was not filed within 30 days of the DAS response (a limitation period PERB has consistently held to be mandatory and jurisdictional¹) an evidentiary hearing would still be required even though PERB would be without jurisdiction over the employee's appeal.

Wise also argues that because neither section 8A.415(2) nor any PERB rules specifically provide for the filing and adjudication of dispositive prehearing motions, such motions are procedurally inappropriate.

PERB has long permitted and adjudicated such motions, even though its rules do not specifically address them, recently noting that although it is not bound to apply the Iowa Rules of Civil Procedure, it often follows them when the agency's rules are silent on a procedural matter. *Walsh & State (Workforce Development)*, 14-MA-10 (PERB 2015) at 2 (granting motion for summary judgement). *See also Cudal & State (Dept. of Public Health)*, 92-MA-24 (ALJ 1992) (dismissing grievance appeal where initial grievance untimely); *Elsberry & State (DHS)*, 03-MA-13 (ALJ 2003) (same); *Corbin & State (IDOP)*, 96-MA-06 (PERB 1996) (same); *Tebben & State (DOT)*, 92-MA-18 (ALJ 1992) (same); *Giles*

¹ *See, e.g., Custis & State (DOC)*, 92-MA-02 and 31 (PERB 1993); *Alleman & State (Revenue & Finance)*, 96-MA-10 (PERB 1996).

& State (DOC), 03-MA-08 (ALJ 2003) (same); *Rule & State (DHS)*, 06-MA-03 (ALJ 2006) (dismissing disciplinary action appeal where appeal of discharge to DAS untimely); *Pezley Group & State (DHS)*, 14-MA-12 (ALJ 2014) (dismissing grievance appeal where initial grievance untimely).

While unnecessary motion practice is to be discouraged, PERB's prehearing adjudication of potentially dispositive motions is not prohibited or foreclosed by any statute or rule, and may avoid the extravagant waste of time and effort by the parties and PERB which would result should a potentially lengthy evidentiary hearing on the merits of the appeal be required before a dispositive issue unrelated to the merits can be addressed.

2. *Notice of Appeal Rights.* Wise argues that even if the State's motion is deemed procedurally appropriate, it should be denied because the written statement notifying him of his suspension did not include "proper notice" of his appeal rights. While acknowledging that the written statement "discussed" his appeal rights, Wise argues that it did not reference Iowa Code section 8A.415(2) or DAS subrule 11-61.2(6), and that since it "did not cite to the rule applicable [to him]" the notice was inadequate and any timeliness issue should therefore be overlooked. I cannot agree.

As noted in the recitation of the undisputed facts above, the written statement of discipline and the reasons for it included notice that Wise could file an appeal if he felt his suspension was without just cause, and included a paragraph concerning such appeals which indicated that Wise could appeal his suspension directly with the DAS director within seven calendar days after its

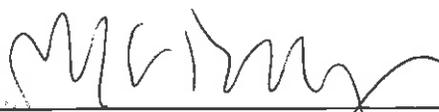
effective date; that the director would respond, and that if he was not satisfied with the response he could request an appeal hearing before PERB pursuant to another subrule which provides additional information about such a PERB appeal. This paragraph is the verbatim text of DAS subrule 11–61.2(6).

DAS subrule 11–60.2(6), quoted above, requires that a written statement of discipline “shall contain the verbatim content of 11–subrule 61.2(6).” The written statement given to Wise plainly complied with this requirement. During oral argument, Wise’s counsel acknowledged that she was unaware of any other notice requirement imposed by statute or rule. One can only conclude that Wise did receive “proper notice” of his appeal rights in accordance with the provision of law requiring such notice.

Ruling

Because Wise’s initial appeal was plainly not filed within the seven-day period prescribed by Iowa Code section 8A.415(2)(a) and DAS rule 11-61.2(6), and having rejected both of Wise’s arguments in resistance to the State’s motion, I conclude that the State’s motion to dismiss this disciplinary action appeal should be and is hereby GRANTED. The appeal is consequently DISMISSED.

DATED at Des Moines, Iowa, this 17th day of August, 2015.



Jan V. Berry
Administrative Law Judge

Filed electronically.
Parties served by eFile.