

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

CONNIE BROOKS,
Appellant,

and

STATE OF IOWA (DEPARTMENT OF
EDUCATION),
Appellee.

Case 15-MA-01

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PUBLIC EMPLOYMENT
RELATIONS BOARD

DECISION AND ORDER

Connie Brooks filed this Iowa Code section 8A.415(1) state employee grievance appeal with the Public Employment Relations Board (PERB or Board) on October 23, 2014. The appeal was timely filed pursuant to PERB subrule 621—11.2(2) following Brooks’ receipt of a third-step denial of her grievance by a designee of the director of the Iowa Department of Administrative Services (DAS) on October 7, 2014.

Brooks’ grievance alleged that DAS and her appointing authority, the Iowa Department of Education [collectively “the State”], did not substantially comply with Iowa Code section 8A.413(13) and DAS rule 11—59.5 when they denied her transfer request.

Pursuant to notice, an evidentiary hearing on the appeal was held before the Board on April 7, 2015, at PERB’s offices in Des Moines, Iowa. Brooks represented herself and Jeffrey Edgar represented the State. By order dated April 7, 2015, the Board allowed the parties to submit post-hearing briefs on any issue presented at the hearing no later than April 24, 2015. The State

submitted a post-hearing brief on April 24, 2015, and the record was closed at that time. Both parties were afforded full opportunity to present evidence and arguments in support of their respective positions.

Based upon the evidence presented at hearing and the parties' oral and written arguments, the Board makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

At all relevant times, Brooks was an Education Program Consultant (EPC) in the Bureau of Information Analysis Services in the Iowa Department of Education (IDOE). In August 2014, Brooks requested a transfer to a vacant EPC position in the Bureau of Learner Strategies and Support. This appeal follows from the denial of this transfer request.

IDOE is organized into multiple divisions and those divisions are further divided into bureaus. Job classifications are not unique to individual bureaus; rather, multiple bureaus may have the same job classifications. For example, the Bureaus of Learner Strategies and Support, Standards and Curriculum, Educator Quality, Information Analysis Services, and School Improvement each have employees in the EPC job classification.

In addition to EPCs, IDOE has other consultant job classifications such as Administrative Consultant. Historically, the State treated "consultants" as at-will employees with no automatic transfer rights. This changed in 2012 following an Iowa Court of Appeals decision in *Schroeder v. PERB*, No. 11—1174, 2012 WL 1439044 (Iowa Ct. App. Apr. 25, 2012), which reversed PERB's

determination that Deborah Schroeder, an EPC with the IDOE, was part of IDOE's "professional staff" and thus exempt from the merit system. Brooks and the State now agree, based on *Schroeder*, that she and all other consultants are merit-covered employees.

Brooks felt that IDOE continued to treat consultants as at-will employees following the *Schroeder* decision. As a result, she participated in a successful campaign to organize a group of state employees under Iowa Code chapter 20. In January 2014, PERB certified AFSCME Iowa Council 61 as the exclusive representative of a previously determined bargaining unit, commonly referred to as the education unit, which included the consultant job classifications.

Following its certification, AFSCME and the State negotiated a Memorandum of Understanding (MOU) concerning the education unit. The parties signed it in August 2014. The MOU contained a provision on transfer rights which granted automatic transfer rights within employing units, defined as "bureaus" for IDOE employees. It was silent as to transfers rights between employing units.

On August 20, 2014, Brooks requested a transfer to the vacant EPC position in the Bureau of Learner Strategies and Support. Before denying the request, IDOE asked DAS if the MOU permitted this transfer. DAS responded that because the transfer would be between two employing units, *i.e.* between bureaus, the MOU did not provide for it. IDOE informed Brooks that the requested transfer was "not an option under the MOU" and advised her that she could apply for the vacant position through the general application

process. The present appeal follows DAS's denial of Brooks' non-contract grievance regarding IDOE's decision on her requested transfer.¹

CONCLUSIONS OF LAW

Iowa Code section 8A.415(1) establishes PERB's authority and the controlling decisional standard in grievance appeals such as the instant case.

That section provides:

8A.415 Grievance 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 the 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.

Particularly significant in the above-excerpted section is that PERB's decisions in grievance appeals "shall be based upon a standard of substantial compliance with [subchapter IV of chapter 8A] and the rules of the department [of Administrative Services]." Iowa Code § 8A.415(1)(b). The appealing

¹ There was substantial evidence presented at hearing regarding Brooks' qualifications and work history, her attempts to reclassify her position, and the process for exempting positions from the merit system. This evidence is not relevant to the issues presented here and is therefore not included in our findings of fact.

employee bears the burden to establish the State's failure to substantially comply. *Fulton v. State*, 10-MA-03 at 9 (PERB 2011). In order to prevail on her appeal, Brooks must thus establish that the State failed to substantially comply with a provision of Iowa Code chapter 8A, subchapter IV, or a DAS rule.

Brooks' grievance alleges a violation of both Iowa Code chapter 8A, subchapter IV, and a DAS rule. Specifically, she alleges a violation of Iowa Code section 8A.413(13) (2013), which states:

8A.413 State human resource management--rules.

The department [of Administrative Services] shall adopt rules for the administration of this subchapter [IV] pursuant to chapter 17A. Rulemaking shall be carried out with due regard to the terms of collective bargaining agreements. A rule shall not supersede a provision of a collective bargaining agreement negotiated under chapter 20. . . . The rules shall provide:

* * *

13. For transfer from a position in one state agency to a similar position in the same state agency or another state agency involving similar qualifications, duties, responsibilities, and salary ranges. Whenever an employee transfers or is transferred from one state agency to another state agency, the employee's seniority rights, any accumulated sick leave, and accumulated vacation time, as provided in the law, shall be transferred to the new place of employment and credited to the employee. Employees who are subject to contracts negotiated under chapter 20 which include transfer provisions shall be governed by the contract provisions.

Brooks also alleges a violation of DAS rule 11—59.5, which provides:

11-59.5 Transfer.

An employee may request a voluntary transfer. The decision to grant or deny the request is the appointing authority's.

An appointing authority may involuntarily transfer an employee. To do so, any applicable collective bargaining agreement provisions regarding transfer must first be exhausted. Transfers may be interagency or intra-agency. Involuntary interagency transfers require the approval of both the sending and the receiving appointing authorities.

To be eligible to transfer, the employee must meet any minimum qualifications and selective requirements for the position.

If the transfer of an employee would result in the loss of merit system coverage, the transfer shall not take place without the affected employee's written consent to the change in merit system coverage. A copy of the consent letter shall be forwarded by the appointing authority to the director. If the employee does not consent to the change in coverage, a reduction in force may be initiated in accordance with these rules or the applicable collective bargaining agreement.

The parties invite us to address some unique issues not typically present in section 8A.415(1) state employee grievance appeals. The State argues that the MOU is a "contract negotiated pursuant to chapter 20 of the Iowa Code" and therefore its transfer provisions, rather than chapter 8A and DAS rules, govern Brooks' transfer request. Consequently, the State argues, the appeal is not properly before PERB and it must be dismissed. Brooks argues that if the MOU is "contract negotiated pursuant to chapter 20 of the Iowa Code," any merit system protections which are greater than protections found in the contract are available to her even if the contract addresses the subject protections. She argues that the transfer procedures under the merit system provide greater protection than those in the MOU and therefore the merit system protections for transfers apply in this matter. While we question the validity of some or all of their arguments, we need not address them because, even if we were to accept Brooks' position on this point, she has not established that the State failed to substantially comply with Iowa Code section 8A.413(13) or DAS rule 11—59.5.

“Administrative agencies such as PERB have only such authority as is specifically conferred upon them by the legislature or necessarily inferred from the statutes which created them.” *Fulton*, 10-MA-03 at 15 (citing *Iowa Power & Light Co. v. Iowa State Commerce Comm’n*, 410 N.W.2d 236 (Iowa 1987)). Therefore, PERB’s authority in this matter is limited to a determination whether the State failed to substantially comply with the cited statutory and rules provisions.

“Substantial compliance” is not defined in chapter 8A but we have endorsed the following definition used by the Iowa Supreme Court in other contexts:

“[s]ubstantial compliance” with a statute 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 v. State, 07-MA-04 at 5 (PERB 2008) (quoting *Brown v. John Deere Waterloo Tractor Works*, 423 N.W.2d 193, 194 (Iowa 1988)). “Under this standard we do not evaluate the effectiveness or fairness of an applicable rule.” *Fulton*, 10-MA-03 at 8.

A. Iowa Code section 8A.413

Iowa Code section 8A.413(13) directs DAS to adopt rules for “transfers from a position in one state agency to a similar position in the same state agency or another state agency. . . .” In response to this statutory directive, DAS adopted rule 11—59.5, which states in part, “An employee may request a

voluntary transfer. The decision to grant or deny the transfer is the appointing authority's."

Brooks acknowledges that DAS has adopted rule 11—59.5 on transfers. However, she asserts the rule as adopted does not fulfill DAS's statutory duty under section 8A.413(13). Brooks argues the rule on transfers as promulgated by DAS grants "unfettered discretion" to appointing authorities to deny transfers and this has resulted in "de facto denials of transfers beyond the union contracts" without consideration of individual qualifications. She argues the DAS rules on transfers should have language pertaining to the postings, the time lines, and the procedures for implementing the transfers within and across state agencies to substantially comply with its statutory directive.

To support her argument, Brooks points us to the Legislature's mandate that certain accumulated benefits transfer with the employee. In Iowa Code section 8A.413(13), the Legislature directed DAS to adopt rules governing transfers, adding that "the employee's seniority rights, any accumulated sick leave and accumulated vacation time, as provided in the law, shall be transferred to the new place of employment and credited to the employee." Brooks argues that specifying what occurs with these benefits when an employee transfers presupposes that there are transfers. In her interpretation, dictating what occurs with these benefits when an employee transfers demands that the DAS rule provide for automatic transfer rights. We disagree.

The existence of statutory language directing that an employee's accrued seniority and leave will be transferred does not mandate automatic transfer

rights. The language simply explains what occurs to the accrued benefits whenever an employee transfers. The language does not speak to or imply when a transfer request must be granted, if ever. The statutory language Brooks cites is silent on that question. A plain reading of section 8A.413(13) does not direct DAS to adopt a rule providing for automatic transfer rights. Instead, it requires DAS to adopt rules addressing transfer rights that ensure accrued seniority and leave must follow the employee if a transfer occurs.

The current DAS rule allows an employee to apply for a transfer. The transfer request is not automatic, but as stated above, the statutory language does not mandate automatic transfer rights. Rule 11—59.5 fulfills DAS’s statutory directive because the adopted rule provides a mechanism for transfers. Consequently, we conclude Brooks has not established the State’s failure to substantially comply with the rulemaking requirements of Iowa Code section 8A.413(13).

B. DAS rule 11-59.5

Brooks also alleged the State failed to substantially comply with DAS rule 11—59.5. As stated above, PERB’s role is limited to the inquiry whether the State substantially complied with the existing rule as written. PERB has no authority to adjudicate the validity or fairness of rules that were adopted through the rulemaking procedure. *Fulton*, 10-MA-03 at 8. The adopted rule provides in part, “An employee may request a voluntary transfer. The decision to grant or deny the transfer is the appointing authority’s.”

The discretionary nature of the DAS rule on transfers undisputedly gives the appointing authority sole discretion to grant or deny transfer requests. The rule imposes no duty on the appointing authority to consider any set of factors in making that decision, nor does it require the appointing authority to grant a transfer request. In this instance, the facts demonstrate IDOE exercised its discretion under the DAS rule when denying Brooks' transfer request and therefore substantially complied with it. Even assuming that Brooks was otherwise qualified for the requested transfer, the discretionary nature of rule 11—59.5 precludes a conclusion that IDOE failed to substantially comply with its provisions. *See Scurr*, 02-MA-05 at 5. The rule allows the appointing authority to grant transfer requests, but it does not compel them to do so. As a matter of law, a denial of a transfer request does not violate DAS rule 11-59.5.

Although Brooks alleges the State failed to substantially comply with DAS rule 11—59.5, the true core of her complaint is not the State's compliance with the rule as written, but rather its discretionary nature. According to Brooks, granting unfettered discretion to appointing authorities is problematic because "discretion is the antithesis of the merit system." Brooks' assessment as to the impact of the written rule may be entirely accurate but it does not change PERB's limited statutory authority in section 8A.415(1) appeals.

We are unaware of any statutory authority, in Iowa Code chapters 8A, 17A, 20 or elsewhere, which grants us the authority to determine the validity of DAS rules in section 8A.415(1) cases. Nor do we think such authority is necessarily inferred from section 8A.415(1) or any other statute. Instead, we think our authority and responsibility is simply that specified in the statute – to hear the evidence and determine whether the actions challenged in the grievance were in substantial compliance with Iowa Code chapter

8A, subchapter IV, and DAS rule. If they were, the grievance is denied; if they were not, the grievance is sustained.

Fulton, 10-MA-03 at 15-16. PERB has no power or authority to determine the fairness or validity of DAS rules promulgated through the rulemaking process. *Stratton v. State*, 93-MA-13 at 8-9 (PERB 1995) *aff'd*, *Stratton v. PERB*, Case No. AA-2535 at 5-6 (Polk Co. Dist. Ct. Oct. 27, 1995). *See also Riddle v. PERB*, No. CV 4746 at 9 (Polk Co. Dist. Ct. Oct. 30, 2003). Our analysis is limited to determining whether the State substantially complied with the rule as written. Here, we conclude that the State substantially complied with rule 11—59.5.

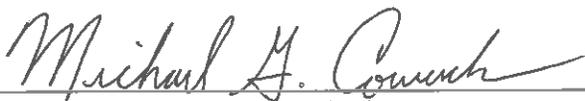
Nothing in Iowa Code section 8A.413(13) directs DAS to adopt a rule requiring appointing authorities to grant automatic transfer rights. Nor does DAS rule 11—59.5 compel the appointing authority to grant a transfer request when an applicant meets the minimum qualifications and selective requirements. For these reasons, IDOE's denial of Brooks' transfer request does not constitute a failure to substantially comply with section 8A.413(13) or DAS rule 11—59.5. Accordingly, we issue the following:

ORDER

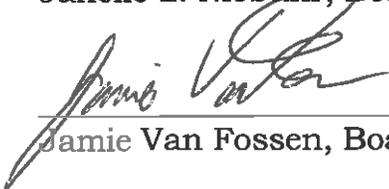
Brooks' grievance appeal is hereby DISMISSED.

DATED at Des Moines, Iowa, this 10th of August, 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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