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PERB

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

MARTIN LLOYD JACOBS, Appellant, and STATE OF IOWA (DEPARTMENT OF NATURAL RESOURCES), Appellee.	CASE NO. 100086

RULING AND ORDER

Martin L. Jacobs filed this Iowa Code section 8A.415(1) state employee grievance appeal with the Public Employment Relations Board (PERB) on November 29, 2015, following the third-step denial of his non-contract grievance by the Iowa Department of Administrative Services (DAS). On December 16, 2015, the State filed a motion to dismiss the appeal on the ground that the Appellant failed to allege a violation of a statutory provision or department rule upon which PERB could properly grant relief pursuant to Iowa Code section 8A.415(1).[1] Oral arguments on the motion were held by telephone conference on February 17, 2016.

Facts and Proceedings

In determining whether a claim upon which relief may be granted has been stated, the hearing officer accepts as true the allegations of the appeal and construes those allegations in a light most favorable to the non-moving party. *See, e.g., Callahan and State of Iowa (Dept. of Transp.)*, 04-MA-02 at 2.

[1] The State's motion included another ground for dismissal which was subsequently withdrawn and will not be addressed here.

Accordingly, the facts are deemed to be those contained in Jacobs' appeal, including attachments, which may be summarized as follows.

Jacobs is employed by the State of Iowa as an Environmental Engineer with the Iowa Department of Natural Resources (DNR). The State offers and DAS administers health insurance benefits to executive branch employees such as Jacobs. The State's health insurance benefits run on a calendar year basis.

If a non-contract employee enrolls into the State's health insurance program, the employee is responsible for paying a set percentage of the insurance premium cost. The State gives an employee a premium reduction for the employee's share of the health insurance premium if the employee participates in the State's Wellness Program.

The Wellness Program has several requirements that must be timely completed before an employee receives the wellness premium reduction. An employee must first complete a biometric screening and an online health assessment. The deadline for this requirement is in the fall preceding the calendar year for which the employee seeks the wellness premium reduction. Jacobs timely completed his biometric screening and online health assessment in August and October 2014, respectively. As such, he was eligible for and received the wellness premium reduction for calendar year 2015.

An additional requirement is imposed if the Wellness Program participant is identified for health coaching based on the results of the biometric screening and the online health assessment. The employee is notified if health coaching is

required, the number of telephonic health coaching sessions to complete and the deadline by which they must be completed. The wellness participant must complete the health coaching requirement to remain eligible for participation in the Wellness Program for the following calendar year.

Based on the results of his biometric screening and online health assessment in fall 2014, Jacobs was notified he was required to complete six health coaching calls by June 30, 2015, to remain eligible for participation in the Wellness Program and thus receive the wellness premium reduction for calendar year 2016.

By April 20, 2015, Jacobs had completed five of the six health coaching calls. He was scheduled to have the sixth health coaching call on June 1, 2015. On that date, the health coach called Jacobs as scheduled. However, the call was disconnected as Jacobs answered the call. He called the number back but it did not connect him to the original caller and instead transferred him to a general office number. While not filed with PERB in the instant appeal, Jacobs provided his phone records to the DAS director's designee at the Step 3 meeting that purportedly show he immediately called the number back following the disconnected call.

Later on the day of the disconnected call, after it became obvious to Jacobs that the health coach was not going to call again, he scheduled a replacement coaching call for July 6, 2015. It is unknown from the record before me why Jacobs' replacement call was not scheduled for a date prior to the June

30 deadline. Nevertheless, he completed his sixth health coaching call on July 6 as rescheduled.

On July 23, 2015, Jacobs received an email from Wellmark Wellness Center informing him that he is not eligible to receive the wellness premium reduction for calendar year 2016 because he failed to complete six health coaching calls prior to the June 30, 2015, deadline. Jacobs immediately sought assistance from DNR Human Resources regarding the ineligibility determination. He received an email from DNR Human Resources on August 31, 2015, stating his "appeal of this decision would be denied." Jacobs submitted a grievance on the wellness ineligibility decision to his supervisor on September 11, 2015. Jacobs and his supervisor had a phone conversation on September 17 during which they agreed to waive Steps 1 and 2 of the grievance procedure and allow Jacobs to proceed directly to DAS at Step 3 because DAS, as the administrator of the State's health insurance program, was thought to be the only agency who had the ability to reverse the ineligibility determination.

Jacobs filed his non-contract grievance with DAS on October 1, 2015, pursuant to DAS rule 11—61.1(1)(c). In his grievance to DAS, Jacobs argued he answered the scheduled health coaching call on June 1 even though the call immediately disconnected. Thus, even though no conversation took place, it should still "count as an attempt for [him] to receive the sixth call." Jacobs further argued he completed a replacement call on July 6, which was shortly after the June 30 deadline and "made no difference in the utility and

effectiveness of the call." Jacobs did not reference any provision of Iowa Code chapter 8A, subchapter IV, or DAS administrative rules in his grievance to DAS.

On October 31, 2015, DAS denied the grievance by concluding Jacobs failed to prove the State failed to substantially comply with a section of Iowa Code chapter 8A, subchapter IV, or DAS administrative rules.

Jacobs subsequently filed the instant appeal with PERB on November 29, 2015. Jacobs' appeal states, in part:

> I am appealing the denial by DAS of my grievance concerning the unfair denial of my wellness incentive for calendar year 2016...The [DAS] denial appears to be based on my inability to establish that Management failed to substantially comply with Iowa Code chapter 8A, subchapter IV or DAS administrative rules. This is a totally unreasonable basis for denial because, as stated by [the DAS designee] in his document, the Wellness Program is not discussed in these sections.
> The intent that these programs be administered in a fair manner is stated in Chapter 17A of the Iowa Administrative Procedure Act, which is referenced in 8A.415. Part of the stated purpose of that chapter includes "to increase the fairness of agencies in their conduct of contested cases proceedings" (17A.1.3). I believe that my grievance was unfairly denied based on the inability to reference a provision that has not even yet been added to the rules. My grievance should have been evaluated based on a fair application of the intent of the Wellness Program.

On December 16, 2015, the State filed a motion to dismiss arguing that the appeal fails to state a claim upon which PERB can grant relief pursuant to Iowa Code chapter 8A.415(1) because Jacobs failed to allege a lack of substantial compliance with any statutory provision of Iowa Code chapter 8A, subchapter IV, or DAS administrative rules. Jacobs resisted the motion stating it is "not

possible to cite a provision in any of these relating to this case because the Healthy Opportunities Premium Reduction is not covered in any of these." He further argues that it is "an unreasonable claim since those rules do not exist" and "because no rules have been enacted, it is not possible to determine if DAS was correct in following those rules."

Analysis 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 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 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]." The section 8A.415(1)(*b*) reference to "rules of the department" refers to rules adopted pursuant to the rulemaking procedure specified in Iowa Code chapter 17A. *Callahan*, 04-MA-02 at 4 (footnote 1). In order to prevail, Jacobs must establish that the State failed to substantially comply with a provision of Iowa Code chapter 8A, subchapter IV, or DAS rules. *Id.* at 3.

It is apparent from the face of Jacobs' appeal that he is not claiming a lack of substantial compliance with the statute or DAS rules occurred. In fact, he concedes the Wellness Program is not contained in, and thus does not identify, any provision of Iowa Code chapter 8A, subchapter IV, or DAS rules with which DNR or DAS has failed to substantially comply. Given this failure, PERB has no basis upon which to find the State failed to substantially comply with any statutory provision or department rules when it determined Jacobs was ineligible to participate in the Wellness Program for calendar year 2016.

Jacobs premises his appeal on "fairness" ("my grievance was unfairly denied") by arguing that his appeal ought to be "evaluated based on a fair application of the intent of the Wellness Program."

It is well-established that the scope of PERB's review in section 8A.415(1)(*b*) appeals is limited to determining whether the State failed to substantially comply with an existing provision of Iowa Code chapter 8A,

subchapter IV, or DAS administrative rules. *Stoner and State of Iowa (Dept. of Transp.)*, 03-MA-03 at 3.

> [W]e think our authority and responsibility is simply that specified in the statute [8A.415(1)]--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 et al. and State of Iowa (Dept. of Corr.), 10-MA-03 at 15-16. It is beyond PERB's statutory authority to evaluate, in an 8A.415(1) grievance appeal, the fairness of decisions made by DAS absent a statutory provision or administrative rule that requires DAS to be "fair" in taking such action. *See, e.g., Brooks and State of Iowa (Dept. of Educ.)*, 15-MA-01 at 8-11.

This conclusion is not altered by Jacobs' reliance on "fairness" language as found in Iowa Code chapter 17A. He argues PERB can and should evaluate his claim using a "fairness" standard because chapter 17A, which is referenced in section 8A.415(1)(*b*), provides that one purpose of chapter 17A is "to increase the fairness of agencies in their conduct of contested case proceedings." Iowa Code §17A.1(3). While I agree that the Administrative Procedure Act has references to "fairness," I reject Jacobs' argument that chapter 17A imposes a "fairness" standard for my decision in this 8A.415(1) appeal.

"Precise, unambiguous language will be given its plain and rational meaning in light of the subject matter." *Carolan v. Hill*, 553 N.W.2d 882, 887 (Iowa 1996). A plain reading of Iowa Code section17A.1(3) shows the connection Jacobs attempts to make between that section and section 8A.415(1) is without

merit. The standard for my decision in this appeal is plainly found in 8A.415(1)(*b*), which directs that "[d]ecisions rendered shall be based upon a standard of substantial compliance with this subchapter and the rules of the department." PERB has exclusively applied this standard in section 8A.415(1) appeals. *See, e.g., Stoner*, 03-MA-03 at 4; *Stratton and State of Iowa (DHS)*, 93-MA-13 at 7-10. Because there is no ambiguity regarding the correct standard to apply, I need not look further than to the language of section 8A.415(1)(*b*).[2]

It is regrettable that Jacobs was determined ineligible for participation in the Wellness Program and lost the premium reduction for calendar year 2016 even though he appears to have attempted to complete all program requirements. The last of six health coaching calls is the only item he had yet to complete prior to June 30, 2015, and he was originally scheduled to complete it on June 1, 2015. Following the dropped call that day, Jacobs was allowed to schedule the "replacement call" for a date after the June 30 deadline. There is no indication that Jacobs received any notification, from the day of the disconnected call and scheduling a "replacement call" on June 1 through the deadline on June 30, that his July 6 "replacement call" would not count toward completing his health coaching requirement. He only received this notification on

[2] Another aspect of Jacobs' "fairness" argument is that it is "unreasonable" and unfair for DAS to deny his grievance "based on the inability to reference a provision that has not even yet been added to the rules." While this specific complaint regarding the absence of rules on the Wellness Program may be a ripe subject for a petition for the adoption of rules pursuant to Iowa Code §17A.7, it is not a viable complaint before PERB in this case because Jacobs has not alleged that any provision of Iowa Code chapter 8A, subchapter IV, mandates DAS to promulgate rules on the Wellness Program.

July 23, 2015, well after the deadline had passed and he had no way to remedy the inadequacy.

If fairness was the standard, and the facts are as I am required to assume here, Jacobs' appeal would be sustained and the ineligibility determination would be reversed. However, even accepting Jacobs' assessment that DAS's determination fails a "fairness" standard, such conclusion does not change PERB's limited statutory authority in 8A.415(1) appeals.

Jacobs' grievance appeal fails to even allege, and Jacobs concedes he is not claiming, a lack of substantial compliance with a provision of subchapter IV of Iowa Code chapter 8A or DAS rules. The grievance thus fails to state a claim upon which relief may be granted by PERB. The ALJ consequently enters the following:

ORDER

The State's motion to dismiss is granted and Jacobs' grievance appeal is hereby DISMISSED.

DATED at Des Moines, Iowa this 1st day of April, 2016.

J. Sarajlija

Jasmina Sarajlija
Administrative Law Judge

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