

STATE OF IOWA  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

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IN THE MATTER OF	)	
	)	
JOHN L. SANDY,	)	
PERB Roster Arbitrator,	)	CASE NO. 100726
Respondent.	)	
	)	

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DECISION AND ORDER

On April 13, 2016, the Public Employment Relations Board (PERB or Board) filed a Statement of Charges and Notice of Hearing against John L. Sandy (Respondent) alleging that:

Count I: The existence of numerous typographical, grammatical and spelling errors in [an] arbitration decision issued by Respondent demonstrates that he does not possess, or in this case failed to exercise, the good written communication skills required of arbitrators by 621-14.5(3), thus warranting probation, suspension or removal from the PERB arbitration roster in accordance with 621-14.9(1)(a), (e) and (f).

Count II: The existence of substantive inaccuracies and omissions, the lack of cited authority and the lack of thorough analysis in the arbitration decision issued by Respondent demonstrates that he does not possess, or in this case failed to exercise, the ability to conduct evidentiary hearings in a fair and impartial manner, develop an accurate record, and prepare and issue clear and reasoned awards required of arbitrators by 621—14.5(3), thus warranting probation, suspension or removal from the PERB arbitration roster in accordance with 621—14.9( 1)(a), (e) and (f).

Count III: Respondent's failure to acknowledge the existence of evidence admitted in support of the grievance and to discuss and analyze its effect in his grievance arbitration decision, and the inclusion of clear inaccuracies in the decision, demonstrates a lack of fairness and impartiality required of arbitrators by the Code of Professional Responsibility for Arbitrators

of Labor Management Disputes, compliance with which is required by 621-14.3(2), thus warranting probation, suspension or removal from the PERB arbitration roster in accordance with 621-14.9(1)(a) and (f).

These charges result from a complaint (PERB Case No. 100705) filed with the Board on February 11, 2016, by a former employee of the State of Iowa, Susan Ackerman. The Board has jurisdiction in this matter pursuant to Iowa Code sections 20.6(3) and 20.6(4).

A contested case hearing within the meaning of Iowa Code section 17A.12 was conducted before the Board on May 24, 2016 at the Ola Babcock Miller Building, Des Moines, Iowa. The Respondent appeared and was represented by Attorney Stephen F. Avery. The Public Interest was represented by Attorneys Diana S. Machir and Amber DeSmet—members of the Board’s professional staff. Board Chairperson Michael G. Cormack and Members Jamie Van Fossen and Mary T. Gannon were present at the hearing, which was open to the public and recorded by a certified shorthand reporter. PERB Administrative Law Judge Jan V. Berry assisted the Board in conducting the hearing.

#### THE RECORD

The record in this contested case consists of the Statement of Charges and Notice of Hearing; Respondent’s answer; notices of appearance by counsel; applications that the Board take official notice of the filings in PERB Case No. 100705 and grant leave to present witness testimony by telephone; PERB’s notice of intent to take official notice and order granting leave to present testimony by telephone; Respondent’s combined motions in limine, to seal a portion of the

evidentiary record and for *in camera* review of that portion of the evidentiary record; PERB's order concerning the combined motions; the officially noticed filings in Case No. 100705; the testimony of witnesses Susan Ackerman, Susan Bolte, Jeffrey Edgar and Respondent; the arguments of counsel, and the following exhibits:

Joint Exhibit 1: Record of the arbitration hearing before Respondent;  
1A: State's arbitration exhibits;  
1B: AFSCME's arbitration exhibits;  
1C: State's post-arbitration brief;  
1D: AFSCME's post-arbitration brief;  
1E: Audio recording of the arbitration hearing.

Joint Exhibit 2: Respondent's arbitration decision.

Public Interest's Exhibits 1-4, 5A-5G.

Respondent's Exhibits 1 and 2.

#### FINDINGS OF FACT

Respondent Sandy is an Iowa attorney and since February, 1998, has been a member of PERB's roster of arbitrators, in both the interest and grievance categories. From 1998 until 2010, when fact-finding was eliminated as a step in the Iowa Code chapter 20 impasse procedures, he was also a PERB-listed fact-finder in interest disputes. Since 1989 he has also been a PERB-contracted ad hoc mediator of interest disputes. During these tenures Respondent has been "selected" 67 times from fact-finding, interest arbitration or grievance arbitration lists generated and submitted to parties by PERB and has issued seven fact-finding reports, 14 interest arbitration awards and not

fewer than 11 grievance arbitration awards.<sup>1</sup>

On January 30, 2015, the State terminated the employment of Susan Ackerman, an employee in the Unemployment Appeals Division of Iowa Workforce Development (IWD). Ackerman's position was within a bargaining unit represented by AFSCME Iowa Council 61, which filed a grievance challenging her termination pursuant to the provisions of AFSCME's collective bargaining agreement with the State (the Ackerman grievance). Following the denial of the grievance at the initial steps of the contractual grievance procedure AFSCME advanced the grievance to arbitration and the parties "selected" Respondent to serve as arbitrator from a list requested from and provided by PERB.

An arbitration hearing on the grievance was held before Respondent on December 8, 2015 in Des Moines, at which the State was represented by Attorney Jeffrey R. Edgar and AFSCME by Union Representative Matthew Butler. Respondent provided both parties with the unrestricted opportunity to call witnesses and present documentary evidence, and both did so. The record developed before Respondent was substantial—the State presented testimony from three witnesses as well as exhibits consisting of over 140 pages of documentary evidence while AFSCME presented the testimony of Ackerman

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<sup>1</sup> "Selected" in this sense does not mean the parties necessarily agreed upon the identity of their arbitrator. In interest arbitration proceedings pursuant to Iowa Code section 20.22, the parties "select" their arbitrator by alternatively removing names from the PERB-provided list until the name of one person remains, who becomes the arbitrator. Parties typically employ the same type of "striking" procedure to identify (*i.e.*, "select") their arbitrator, although the process prescribed by the collective bargaining agreement between the State and AFSCME is not revealed by the record before us.

and over 90 pages of exhibits. Respondent admitted into evidence all of the exhibits offered, and established a schedule for the parties' submission and exchange of post-hearing briefs, which were subsequently submitted.

The arbitration record made before Respondent reveals that at the time of her termination Ackerman was an attorney licensed to practice in Iowa, North Carolina and Minnesota. She is the mother of a daughter and a son. She was first employed by the State of Iowa in 1999, as an Administrative Law Judge II (ALJ) for the Iowa Department of Corrections. In that position she became acquainted with and a workplace friend of Monica Reynolds, a Human Resources Associate (HRA) at the same correctional institution as Ackerman. An HRA in an employee's department or institution is the typical first point of contact for an employee seeking information concerning personnel matters, including the State's various employee benefit programs.

In 2000, with Reynolds' assistance, Ackerman transferred to a position as an ALJ at IWD in its Unemployment Appeals Division, where she heard and decided contested unemployment compensation appeals. In 2010 Reynolds transferred to a position as an HRA for IWD, where Ackerman was employed.

The arbitration record shows that in the fall of 2012, during the open enrollment period for various State employee benefit plans including health insurance, Ackerman sought Reynolds' guidance and advice concerning adding her daughter, Catherine Holcombe, to Ackerman's health insurance coverage. Catherine had married Jeremy Holcombe in Hawaii in 2009, but had moved to Minnesota without Jeremy earlier that year and had enrolled as a full-time

student at Argosy University in Minnesota.

The arbitration record contains varying descriptions and explanations of the eligibility requirements for an employee obtaining health or dental insurance coverage for family members. But the eligibility requirements relevant to Ackerman's termination and grievance are most clearly (although not perfectly) expressed in State arbitration Ex. 11, to the effect that an employee's children may be covered through the end of the calendar year in which they turn age 26 but that in order to be eligible for coverage in later years, a child must be unmarried and a full-time student. The arbitration record reveals that in the fall of 2012, Ackerman's daughter was 27 years of age and her son was 25.

AFSCME offered and Respondent admitted AFSCME arbitration Ex. J, which is labeled and has been referred to as an affidavit by Reynolds,<sup>2</sup> in which she relates that Ackerman advised her that Catherine was married but was separated from her husband, and that she intended to file for divorce but had not yet done so. Reynolds' statement, corroborated by Ackerman's testimony at the arbitration hearing, indicates that Ackerman told Reynolds that she had contacted the health insurance provider and explained her daughter's situation and her desire to add the daughter to her coverage, and that the provider had indicated that the decision was up to the employer.

According to her statement, Reynolds then contacted Rose Baughman,

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<sup>2</sup> The exhibit is more accurately viewed as a written statement, rather than an affidavit, since it was not confirmed by oath or affirmation before an officer having authority to administer oaths.

who Reynolds described as the insurance coordinator for the Iowa Department of Administrative Services (DAS), and explained Ackerman's situation, including the fact that her daughter intended to file for a divorce but had not yet done so. Reynolds' statement indicated that Baughman advised her that if the insurance provider was leaving the coverage determination up to the State, then it was fine to add the daughter to Ackerman's health insurance coverage.<sup>3</sup> Reynolds' statement recited that she then told Ackerman that she could add her daughter to her health insurance coverage, that Ackerman filled out the paperwork and that it was forwarded to DAS.

The arbitration record contains an October 31, 2012 email from Reynolds to Ackerman (State arbitration Ex. 5) which consisted solely of a link to a page on the Iowa Benefits website as well as a copy of online enrollment information which Reynolds entered later that day (State arbitration Ex. 4) and which reflects the addition of Ackerman's son and daughter to her health insurance coverage for plan/calendar year 2013.<sup>4</sup>

State arbitration Ex. 5 also contains the following email exchange between Ackerman and Reynolds which occurred the following day, November 1, 2012:

(Ackerman at 11:09 a.m.)

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<sup>3</sup> The arbitration record also includes testimony from Baughman and an unofficial transcript of her January, 2015 interview by a representative of management in which Baughman, while acknowledging she had no recollection of a specific conversation with Reynolds about medical coverage for a child of 27 who was separated from a spouse and planning to divorce, denied that she would have answered such a question in the manner described by Reynolds in her written statement, and would have said that in order for a child over 26 to be covered by the employee's plan, the child would have to meet the unmarried and full-time student requirements.

<sup>4</sup> The link referenced in the record is no longer active.

Hey, I've looked at that web site for the dependent tax consequences and it seems that I can only get coverage for Cathy if she is unmarried???

(Reynolds at 12:50 p.m.)  
I thought Cathy was unmarried??

(Ackerman at 12:51 p.m.)  
No, her husband is still in Hawaii but will probably be moving back here next year. ☺

(Reynolds at 12:54 p.m.)  
Who has to know she is married??

The arbitration record reveals that on that same day Ackerman prepared and signed a "Certification of Full-Time Student Status" form. See AFSCME arbitration Ex. K at p.3. In the portion of the form where the employee is asked to "[c]omplete the following information to enroll your unmarried full-time student dependent(s) over age 26" Ackerman inserted her daughter's name and date of birth and indicated that her daughter did not qualify as Ackerman's dependent for federal income tax purposes. Ackerman's signature on the document is preceded by the following printed statement:

*I am providing this information to my employer for insurance enrollment and tax reporting purposes. By signing and returning this form, I certify that all of the statements above are true. I understand that my employer will rely on this information to calculate the taxability of coverage provided to my full-time student over age 26. In addition, I certify that this full-time student is unmarried. If my full-time student's status changes, I will notify my employer immediately by submitting that information, in writing, to my Personnel Assistant.*

The arbitration record reveals that both Ackerman's son and daughter were covered by the State's health insurance program during plan/calendar

year 2013.

The arbitration record also contains uncontroverted evidence that when the enrollment period for plan/calendar year 2014 arrived in the fall of 2013, Ackerman did not enroll her son for family member health coverage because he had reached the age of 26 during 2013, and she realized he was ineligible for 2014 coverage because, although he was a full-time student, he was not unmarried. But on the basis of her 2012 interactions with Reynolds, and since her daughter, then 28 years of age, continued to be a full-time student who was separated from and intending to divorce her husband, Ackerman took steps to continue her daughter's health insurance through the State's plan.

State arbitration Ex. 6 includes two forms prepared and submitted to DAS by Ackerman in furtherance of this effort—one a Certification of Full-Time Student Status like the one she had executed the year before. This form contained the same information and certification and was dated and signed by Ackerman on November 15, 2013. The other form completed by Ackerman was a "Full Time Student Verification Form" which also addressed her daughter's medical benefits. In response to the question "[i]s CATHERINE a full-time student?" Ackerman marked a box indicating "Yes" and identified Argosy University as her daughter's school. In response to the question "[i]s CATHERINE married?" Ackerman marked the box labelled "No." This form did not contain a signature line for the employee, and was not signed by Ackerman.

The arbitration record reveals that Ackerman's daughter was covered by

the State's health insurance program during plan/calendar year 2014.

AFSCME arbitration Ex. G shows that in March, 2014, State Senator Bill Dotzler authored a letter to the Administrator of the U.S. Department of Labor's Office of Unemployment Insurance, requesting an investigation into actions of Teresa Wahlert, then the Director of IWD. Dotzler's letter expressed his general belief that Wahlert had and continued to violate federal laws requiring the fair and impartial administration of unemployment insurance benefits by "sending a clear message to her employees that Administrative Law Judges in Iowa Workforce Development are expected to rule in favor of employers when ruling on claims for unemployment compensation benefits." Dotzler's letter resulted in inquiries by U.S. Department of Labor officials which included repeated communications with Wahlert and the Department's expression of concerns about a perceived lack of insulation of the appeals process from outside pressures which might compromise its fairness and impartiality or the appearance of fairness and impartiality.

Dotzler's letter and the Department of Labor's inquiry apparently also spawned a hearing or hearings before the Iowa Senate Government Oversight Committee, because AFSCME arbitration Ex. G includes a September 5, 2014 letter from State Senator Janet Petersen to Governor Terry Branstad in which Petersen related concerns about the supervision of the Administrative Law Judges like Ackerman in IWD's Unemployment Appeals Division. Petersen's letter sought assurance that "multiple whistle blowers who were subpoenaed regarding the working environment at Iowa Workforce Development" and who

testified before the Oversight Committee would not be the recipients of any retaliatory action by IWD management. The arbitration record includes uncontroverted evidence that Ackerman was one of the IWD employee witnesses who was subpoenaed by and testified before the Oversight Committee.

State arbitration Ex. 3 shows that Ackerman's daughter and her husband filed a joint petition for the dissolution of their marriage in the Hennepin County (Minnesota) District Court in May, 2014, and that a decree dissolving their marriage was entered on June 2, 2014.

The arbitration record reveals that Reynolds had left IWD at some time in 2013 and had been replaced by HRA Heather Semke. State arbitration Ex. 7 indicates that in early November, 2014, Semke emailed forms to Ackerman concerning her daughter's eligibility for plan/calendar year 2015 insurance coverage, and later followed up with Ackerman by email, reminding her of the deadline for their submission and the need for supporting documentation of her daughter's full-time student status. Ackerman again prepared and submitted certification of full-time student status and full-time student verification forms (State arbitration Ex. 8), indicating, as she had the year before, that her daughter was not a dependent for federal income tax purposes, that she was unmarried and was a full-time student at Argosy University.

The arbitration record shows that questions arose concerning Catherine's claimed status as a full-time student, and that an additional issue came to light when Ackerman, realizing that she had used her daughter's married name

(Holcombe) rather than her post-dissolution name of Catherine Brightman on her most recent set of forms, contacted Semke to advise her of the name issue—a conversation which included Ackerman’s explanation that her daughter’s marriage had been dissolved during 2014. State arbitration Ex. 8 includes the revised certification of full-time student status form which Ackerman prepared and signed, using her daughter’s post-dissolution name.

The arbitration record indicates that Ackerman’s contacts with Semke, and additional information submitted concerning the nature of Catherine’s student status, led to discussion between IWD and DAS officials concerning both whether Ackerman’s now-divorced daughter was then a full-time student and whether she had been ineligible for coverage during plan/calendar years 2013 and 2014 because of her marital status, notwithstanding Ackerman’s certifications that her daughter had been unmarried.

State arbitration Ex. 16 reflects that on December 11, 2014, Ackerman was suspended with pay pending the completion of an investigation concerning alleged misconduct. There was uncontroverted testimony at the arbitration hearing that prior to her discharge in early 2015, Ackerman had never been disciplined during her tenure as a State employee, and AFSCME arbitration Ex. L reveals that her direct supervisors at IWD from 2000 through mid-2013 regarded her as an “excellent” or “outstanding” ALJ.

The arbitration record shows that the ensuing investigation included three separate interviews with Ackerman, informal transcripts of which were admitted into the arbitration record as State’s Exs. 17, 19 and 20. While the

interview reflected by Ex. 19 dealt primarily with the daughter's full-time student status in 2013 and 2014, the other interviews (Exs. 17 and 20) included discussion of Ackerman's 2012 contacts with Reynolds and Ackerman's assertions that she had a good-faith basis for making the 2012 and 2013 certifications based on those contacts. None of the interviews contained statements by Ackerman which were inconsistent with Reynolds' written statement (AFSCME arbitration Ex. J). The investigation also included a brief telephone interview with Reynolds (State's arbitration Ex. 18/AFSCME arbitration Ex. F) who stated (consistent with her written statement) that Ackerman had shared the particulars of the daughter's situation and status with her, that she had told Ackerman to contact the insurance carrier, and that she had later contacted Baughman at DAS who had indicated Ackerman could put her daughter on her insurance.

State arbitration Ex. 1 shows that on January 30, 2015, Ackerman received a letter from her Division Administrator informing her that her employment with IWD was terminated. The letter provided, in relevant part:

This action is being taken because our investigation determined that you submitted paperwork in 2013 to the Department of Administrative Services requesting to maintain your adult married daughter on your health insurance; the paperwork contained false statements by you. It has been determined by management that you fraudulently filed forms indicating your daughter was unmarried when in fact she was still married under the law. You signed the forms certifying that all statements were true when they were not. Your claim that you received approval from the IWD Human Resource Associate to add your married daughter does not absolve you from assuring that the information you submit and sign is certified to

be true.

Your termination is for the following violations:

**Iowa Workforce Development Work Rules**

2. Work Performance

c. Deliberate falsification of time sheets, work sheets, production records, materials, or any other records related to work activities. This doesn't apply to advance projections of time worked which must be indicated on time sheets.

d. Deliberate disclosure of confidential information and records to unauthorized individuals; giving false information to other government agencies, private organizations or to employees responsible for record keeping; or the personal or unethical use of such information.

**State of Iowa Employee Handbook Rules**

Dishonesty, conduct which adversely affects the employee's job performance or the department, conduct unbecoming a public employee and misconduct.

**Iowa Code: Chapter 32 – Iowa Rules of Professional Conduct<sup>5</sup>**

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Iowa Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct having dishonesty, fraud, deceit or misrepresentation.

(Emphasis in original.) On February 11, 2015 AFSCME filed a grievance (AFSCME arbitration Ex. C) challenging Ackerman's termination as having been "without just cause and for illegal and prohibited reason(s)" in violation of

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<sup>5</sup> Although the language attributed to the Iowa Rules of Professional Conduct is an accurate quotation of parts of rule 32:8.4, the rules are not provisions of the Iowa Code, as indicated in the letter, but instead comprise chapter 32 of the Iowa Court Rules.

portions of Articles II, III and IV of the parties' collective bargaining agreement. The provisions of the contract deemed by the DAS director's designee to be applicable to the grievance are quoted verbatim in AFSCME arbitration Ex. D as follows:

*Article II, Section 10 (No Reprisal):*

The Employer shall not take reprisal action against an employee for disclosure of information by that employee to a member of the General Assembly, the Legislative Services Agency or the respective caucus staff of the General Assembly or for the disclosure of information which the employee reasonably believes is evidence of a violation of law or rule, mismanagement, a gross abuse of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

*Article III (Management Rights), subparagraphs 3 and 9:*

Consistent with this Agreement, Management shall have, in addition to all powers, duties and rights established by constitutional provisions, statute, ordinance, charter or special act, the exclusive power, duty and the right to:

...  
3. Suspend, discipline or discharge employees for proper cause.

...  
9. Exercise all powers and duties granted to the Employer by law.

*Article IV, Section 8 (Processing grievances):*

Union representatives who are members of Judicial Branch or Executive Branch bargaining units and grievants will be permitted a reasonable amount of time to process grievances during their regularly scheduled hours of employment. Processing grievances shall be defined as investigating, filing, and attending any step meeting and/or hearing regarding grievances. However, only one (1) local Union representative will be in pay status for any one (1)

grievance. Whenever possible, the Union representatives will provide twenty-four (24) hours notice to their supervisor(s).

Further, in a group grievance, up to three percent (3%), but not less than one nor more than ten (10) of the grievants shall be in pay status as spokesperson(s) for the group. Group grievances are defined as, and limited to, those grievances which cover more than one (1) employee and which involve like circumstances and facts for the grievants involved.

The employer is not responsible for any compensation of employees or Union representatives for time spent processing grievances outside their regularly scheduled hours of employment. The Employer is not responsible for any travel or subsistence expenses incurred by grievants or Union representatives in the processing of grievances. Notwithstanding the foregoing provisions of this Section, the Employer agrees to conduct all grievance meetings involving third shift employees either during that shift or at a time which is contiguous to the employee's shift. The Employer is not responsible for any compensation of third shift employees for such grievance meetings unless the Employer specifically requests, or if the parties mutually agree, that the grievant attend the hearing, in which case the grievant shall be compensated for the actual time spent in such hearing at his/her regular hourly rate and shall not be counted as hours worked for purposes of computing overtime.

*Article IV, Section 9 (Discipline and Discharge), in pertinent part:*

The parties recognize the authority of the Employer to suspend, discharge or take other appropriate disciplinary action against employees for just cause.

The grievance was denied by a designee of the DAS director on June 15, 2015. See AFSCME arbitration Ex. D.

AFSCME arbitration Ex. H shows that on February 13, 2015, a complaint against Ackerman was filed with the Iowa Supreme Court Attorney

Disciplinary Board by Stephen Slater, the manager of IWD's Unemployment Appeals Division, on behalf of IWD. The complaint alleged that Ackerman had made affirmative misrepresentations that her daughter was unmarried in the course of enrolling her for health insurance for which she would have otherwise been deemed ineligible, and that her misrepresentations "appear to be a violation of Iowa Rules of Professional Conduct 32:8.4(a) and (c)," both of which had been quoted in the letter of termination.

AFSCME Arbitration Ex. H also reveals that on February 20, 2015, the Administrator of the Attorney Disciplinary Board wrote to both Slater and Ackerman, indicating receipt of the complaint and advising that it would be investigated before consideration at a future meeting of the Board.

AFSCME Arbitration Ex. L was admitted at the arbitration hearing and consists of May, 2015 letters from two of Ackerman's former supervisors at IWD—Daniel S. Anderson and Joseph L. Walsh. Anderson, an IWD Administrative Law Judge since 1984 and Chief ALJ from 1996 until 2011, indicated he was instrumental in Ackerman's hiring and supervised her during his tenure as Chief ALJ. In his letter he characterizes Ackerman as an excellent judge, totally honest and forthright in the performance of her duties and in her personal life, and indicates he also knew Reynolds and observed that she was honest and diligent in the performance of her duties. Although acknowledging that the events which led to Ackerman's discharge occurred following his 2012 retirement, Anderson stated that he had talked to Ackerman about the situation and was shown a copy of Reynolds' statement, which he

viewed as consistent and establishing that nothing more serious than an honest mistake occurred—that Ackerman did not deliberately falsify her insurance request and did not willfully provide false information in connection with her employment. Anderson opined that had this occurred during his tenure as Chief ALJ, he would have simply had Ackerman contact the insurance company to make it whole and would have concluded that discipline of any sort, let alone discharge, was inappropriate.

Walsh's letter indicated that he served as Deputy Director of IWD from 2007 until late 2010, and as Chief ALJ at IWD from January, 2011 through July 2013. The letter indicates that Walsh supervised Ackerman during his tenure as Chief ALJ and characterized her as "a wonderful person: honest, kind and decent. She is also an outstanding ALJ: thorough, fair-minded and timely." Walsh indicated that during his time as Deputy IWD Director he regularly dealt directly with employee discipline issues and other human resources matters, and that after reviewing the evidence and discussing the facts with Ackerman, he did not believe she intentionally violated any IWD work rules and "certainly did not violate any rules of ethics." Walsh wrote that it was apparent to him that Ackerman was working directly with IWD's human resources staff on her insurance issues, and that although it appeared mistakes were made regarding the insurance, it is apparent that she acted with the permission of an IWD human resources staff person and that had her situation arisen while he was Deputy IWD Director the entire matter would have been handled differently.

AFSCME Arbitration Ex. H shows that the Attorney Disciplinary Board's Administrator sent separate July 8, 2015 letters to both Slater and Ackerman. The letter to Slater, a copy of which was also forwarded to Ackerman, provided in part:

The Board found that, as alleged in the complaint, respondent applied for and received health insurance coverage through her employer which included coverage for a married daughter. In applying for the coverage, respondent certified that her daughter was unmarried.

The Board further found that, before applying for coverage for her married daughter, respondent approached her human resources representative and the insurance carrier regarding the possibility of including her daughter in the coverage. The insurance carrier referred her to the human resources department of her employer. The human resources representative told her that the daughter could be added to the insurance coverage. The Board further found that respondent disclosed to the human resource's [sic] representative the fact that her daughter, although separated from her husband was still married.

Under these circumstances, a majority of the Board concluded that respondent's conduct did not amount to an ethical violation, and dismissed the complaint.

Nonetheless, the false certification was troubling and the Board strongly cautioned respondent against any future, similar conduct.

At the arbitration hearing both parties offered evidence of other instances where State employees have been accused of making false statements. See State's arbitration Exhibit 25; AFSCME arbitration Exs. I and N. AFSCME Ex. N reflects a case where an employee of the Department of Human Services

enrolled a woman and her daughter for health and dental insurance on the premise the woman was his common-law wife, while she in fact was still married to another, and was disciplined by a 10-day suspension.

Of note are the final five pages of AFSCME Ex. I, which reflect a 2014 situation where another IWD Administrative Law Judge, an attorney like Ackerman, testified under oath before the Iowa Senate Government Oversight Committee that she had never secretly recorded any conversations with coworkers, when in fact she had. That exhibit further revealed that the Iowa Supreme Court Attorney Disciplinary Board investigated a subsequent complaint against the ALJ filed by the employee who had been recorded and other IWD employees, and concluded that even assuming the accuracy of the ALJ's testimony that she simply had not remembered having recorded the conversation, she had at least recklessly misrepresented the truth to the Senate committee. The exhibit shows that the Attorney Disciplinary Board found and formally admonished the ALJ for a violation of rule of professional conduct 32:8.4(c), but the uncontroverted accompanying affidavit of the recorded employee reveals that no disciplinary action was taken by IWD against the ALJ and also expresses the employee's view that the absence of discipline in that case compared to the discharge of Ackerman shows that Ackerman received disparate discipline.

Further proceedings on the Ackerman grievance in accordance with the parties' collective bargaining agreement resulted in an August, 2015 deadlock of the Grievance Resolution Improvement Process (GRIP) panel (State's

arbitration Ex. 24). The parties subsequently “selected” Respondent to arbitrate the grievance and he scheduled and conducted the previously mentioned hearing in Des Moines on December 8, 2015.

Both parties submitted post-hearing briefs to Respondent. The State’s brief (PERB Joint Ex. 1C) did not explicitly argue the third ground set out in Ackerman’s discharge letter (violation of the Rules of Professional Conduct for Iowa attorneys), but instead argued that the arbitration record established that Ackerman violated the cited IWD work rule and State of Iowa Employee Handbook provisions prohibiting dishonesty and the providing of false information, and that those violations constituted just cause for her discharge within the meaning of the parties’ collective bargaining agreement. The State’s brief gave substantial attention to a rebuttal of AFSCME’s anticipated argument that Ackerman was treated in a disparate manner compared to other employees by attempting to distinguish the lesser employee discipline revealed by AFSCME arbitration Ex. N and by reviewing the cases contained in State arbitration Ex. 25 where employees were discharged for incidents of dishonesty. The State’s brief did not address the situation reflected by AFSCME arbitration Ex. I, where the ALJ misrepresented the truth to the Senate Government Oversight Committee but was not disciplined by IWD.

AFSCME’s arbitration brief (PERB Joint Ex. 1D) made a number of related arguments based on evidence in the arbitration record, but relied on two primary arguments. First, that no violation of IWD rules or the State Employee Handbook occurred because, although the insurance documents

Ackerman submitted in 2013 were filled out improperly, she had a good faith basis for doing so based upon her communications with Reynolds and that her having removed her son from coverage in 2014 because he no longer met the eligibility requirements showed an absence of intent to defraud.<sup>6</sup> AFSCME's second main point was that even if Ackerman's reliance on Reynolds' information was an error in judgment warranting discipline, her termination was disparate treatment compared to the discipline/lack of discipline imposed on the employees involved in the situations revealed by AFSCME arbitration Exs. N and I.

Respondent issued his "Arbitrator's Decision" on January 29, 2016. The decision is replete with typographical, grammatical, punctuation, spelling and word usage errors.

Although the arbitration record contains the verbatim text of the provisions of the collective bargaining agreement which the grievance alleged were violated, they are neither quoted nor specifically identified in Respondent's decision. The decision does, however, appropriately identify and draw a conclusion concerning the overriding issue presented by the grievance—whether the State had just cause to terminate Ackerman's employment based upon the representations she made in November 2013 concerning her daughter's marital status.

Respondent's decision contains a number of obvious inaccuracies and

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<sup>6</sup> AFSCME's argument also included the claim that just cause for discipline did not exist because Ackerman had been targeted by IWD administrators because of her testimony before the Government Oversight Committee.

omits mention or discussion of evidence which is significant in view of the parties' arguments. These inaccuracies or omissions include, but are not limited to the following:

(1) The arbitration record includes incontrovertible evidence that the Iowa Supreme Court Attorney Disciplinary Board investigated the complaint against Ackerman filed by Stephen Slater, and found that her human resources representative, having been told that Ackerman's daughter, although separated from her husband and still married, told Ackerman that her daughter could be added to the insurance. The Disciplinary Board also determined that Ackerman's conduct did not amount to an ethical violation and dismissed the complaint against her. However, in the portion of his decision labelled as the "Statement of the Case," Respondent notes merely that "Aside from her termination; [sic] the State also filed an attorney disciplinary complaint against [Ackerman]. The Iowa Supreme Court Disciplinary Board [sic] declined to further investigation [sic] this complaint."

(2) State arbitration Ex. 1, the letter terminating Ackerman's employment with IWD, listed three "violations" upon which the termination was based: violation of IWD work rules; violation of State of Iowa employee handbook rules, and violation of the Iowa Rules of Professional Conduct, and quoted the allegedly applicable provisions of each. Respondent's decision does not mention that AFSCME had established the invalidity of one of the State's grounds for discharge by showing that the Attorney Disciplinary Board found that Ackerman had not committed an ethical violation.

(3) While referencing and purportedly quoting what Respondent identified as portions of the IWD work rule cited and quoted in the termination letter, Respondent confused (or failed to recognize the distinct nature of) the IWD work rules and the employee handbook by identifying a (somewhat-misquoted) provision of the handbook as part of the IWD work rule.

(4) The arbitration record included Reynolds' written statement (AFSCME arbitration Ex. J), the transcript of Reynolds' interview during the State's investigation (AFSCME arbitration Ex. F), transcripts of investigatory interviews with Ackerman (State arbitration Exs. 17 and 20), Ackerman's testimony at the arbitration hearing and the Attorney Disciplinary Board's findings concerning Reynolds' representations to Ackerman, all of which supported AFSCME's central argument—that no intentional violation had been committed and that just cause for discharge did not exist because Ackerman enrolled her daughter for the 2014 plan/calendar year in reliance on what Reynolds had told her the year before. Despite the primacy of this argument and the presence of this evidence, Respondent stated in his decision that “[t]he grievants [sic] arguments that she was only following Reynolds [sic] directive, [sic] is [sic] not supported by any evidence.”

(5) State arbitration Ex. 6 includes two documents prepared by Ackerman in 2013, one the signed Certification of Full-Time Student Status form, the other the unsigned Full-Time Student Verification form, which posed the question: “Is CATHERINE married?” As noted earlier, Ackerman marked the box on this form indicating “No.” Respondent's decision quotes the latter

document, noting the marking of the “No” box, but incorrectly indicates that Ackerman executed it, when in fact only the former document was executed.

(6) In discussing and distinguishing the disciplinary action reflected by AFSCME arbitration Ex. N, Respondent notes that the actions of the employee involved in that case “were not based on a calculated process to defraud the State, but rather on his ignorance of the fact his paramour [sic] marital status made her ineligible to be married,” suggesting not only that Ackerman did attempt to defraud the State, but that he viewed intent to defraud as a relevant factor in his just cause determination. Respondent’s decision, however, omits any mention of the uncontroverted evidence in the arbitration record that Ackerman had removed her son from the insurance coverage for plan/calendar year 2014 because she knew he was no longer eligible—a fact emphasized by AFSCME in support of its argument that Ackerman had no intent to defraud the State when she enrolled her daughter for plan/calendar year 2014.

(7) The second major point of AFSCME’s argument was that even if Ackerman had made an error in judgment by relying on Reynolds’ advice and authorization so that some sort of discipline might be appropriate, termination was not. In support of this argument AFSCME offered two exhibits in an effort to show that her discharge amounted to disparate treatment compared to that accorded some other employees. Respondent addressed and distinguished the situation described in AFSCME arbitration Ex. N, in part on the basis that the employee involved was not a legally trained ALJ and that Ackerman had a

greater duty as a legal professional. Respondent's decision does not, however, mention or address the situation reflected by AFSCME arbitration Ex. I, where the employee was not disciplined at all even though she (like Ackerman) was an attorney and ALJ at IWD but (unlike Ackerman) had been found by the Attorney Disciplinary Board to have violated the Rules of Professional Conduct by making misrepresentations under oath to the Senate Government Oversight Committee.

(8) Respondent includes a verbatim quote of the 2012 email exchange between Reynolds and Ackerman reflected in State arbitration Ex. 5, and gives it substantial weight in concluding that after the exchange Ackerman "was competent of the knowledge that her daughter was considered married and ineligible to be added to her health insurance plan..." But in emphasizing the perceived significance of Reynolds' inquiry "Who has to know she is married??" Respondent twice misquotes the language of the exhibit he viewed as highly probative, in different ways on both occasions. See PERB Joint Ex. 2 at pp. 4, 5, 8.

Respondent's January 29, 2016 decision concluded that "the State possessed just cause and proper cause to terminate grievant as an ADJ [sic] in this matter," thus impliedly denying the grievance. On February 11, 2016, Ackerman filed a complaint (PERB Case No. 100705) against Respondent pursuant to PERB subrule 621—14.9(3), alleging failures on Respondent's part in connection with his conduct of the evidentiary hearing on the grievance, a lack of impartiality and the presence of multiple defects in the arbitration

decision.

Respondent was notified of and served with a copy of the complaint by certified mail. During the course of the preliminary investigation conducted in accordance with subrule 621—14.9(4) Respondent provided the investigators with a copy of the complete record of the arbitration hearing, as well as with copies of the parties' post-hearing briefs. Following the preliminary investigation of the complaint by designated PERB staff, a majority of the Board concluded that the complaint was not without basis in fact and issued the aforementioned Statement of Charges and Notice of Hearing commencing this contested case proceeding.

Testimony at the May 24, 2016 hearing before PERB shows that no prior formal complaint against Respondent has ever been filed with the Board during his tenure as a fact-finder, interest arbitrator or grievance arbitrator, and that since the issuance of Respondent's decision in the AFSCME/Ackerman grievance, the State and AFSCME have "selected" Respondent from PERB-provided lists of arbitrators on three separate occasions.

At the hearing before PERB Respondent testified on his own behalf. He testified that he billed the parties to the arbitration the \$1,200 per day of service maximum allowed by PERB rule, that he could not be sure of the number of days charged without reviewing his notes, but that "I want to say maybe three and a half days, something of that nature."

At hearing Respondent acknowledged the validity of Count I of the Statement of Charges, reversing his denial of that count in the answer he had

filed earlier. Respondent termed the allegations of Count I “absolutely correct” and expressed his view that the typographical and grammatical errors in the decision are “simply unacceptable.” While acknowledging his ultimate responsibility for the decision and that it should be viewed as his work product alone, Respondent testified that the decision is not representative of his work as an arbitrator. According to Respondent’s testimony, he had made handwritten revisions to drafts of the decision, as is his typical practice, and had signed the version returned to him by his staff after the last revision without reviewing it, only to later discover that a new staff person in his office (who, presumably, had assisted with its preparation) was “having some problems in that area to say the least.”

Respondent testified that, as is his practice in all arbitration cases, he “went through” each and every exhibit admitted at the arbitration hearing. Respondent testified that in the case at hand he employed a just-cause analysis he has “taken from a treatise called Elkouri & Elkouri, which is an arbitration manual that basically breaks down the analysis into a four-prong analysis to look at different elements within the case to analyze whether the termination or whatever the penalty or punishment is—whether it’s appropriate in that case and the level of the punishment.”

Respondent further testified that he was embarrassed by the present proceeding, “being the poster child for the new rule, but aside from that, calling into question my fairness or my biases and things of that nature.” He testified, without contradiction, that in cases where he has been assigned to mediate a

dispute where a family member or close friend works for an involved entity, he has asked that he be replaced in order to avoid the appearance of prejudice.

### CONCLUSIONS OF LAW

It is important to emphasize at this point that the purpose of this case, and our role, is not to review the merits of the conclusions or result Respondent reached and expressed in his decision, or to substitute our opinion for Respondent's on what evidence should or should not have been credited or on how the grievance should have been decided. We have no authority or desire to confirm, vacate, modify or correct Respondent's decision. Our role, instead, is to determine whether the PERB record establishes the existence of any of the grounds for discipline specified in subrule 621—14.9(1) and, if grounds are established, to determine the discipline, if any, which is appropriate under the circumstances. Although our consideration of those questions requires us to review the arbitration record and to draw conclusions concerning the quality of Respondent's decision, such should not be viewed as an expression of what we think the ultimate resolution of the underlying grievance should or should not have been.

The administrative rules cited in the Statement of Charges or relevant to this matter provide, in relevant part:

#### **621—14.3(20) Roster and status of members.**

**14.3(2)** *Adherence to standards and requirements.* Persons listed on the roster shall comply with the agency's administrative rules pertaining to arbitrators. Arbitrators shall conform to the ethical standards and procedures set forth in the current

Code of Professional Responsibility for Arbitrators of Labor Management Disputes, as approved and published by the National Academy of Arbitrators, Federal Mediation and Conciliation Service, and the American Arbitration Association.

**621—14.5(20) Arbitrator roster.**

**14.5(1) Categories of arbitrators.** The roster shall consist of three categories of arbitrators:

- a. Interest arbitrators;
- b. Grievance arbitrators; and
- c. Teacher termination adjudicators.

Persons may be listed on the roster in each category in which they meet the criteria.

...

**14.5(3) Knowledge and abilities.** Applicants must establish requisite knowledge and abilities as follows:

a. For listing on the roster as an interest arbitrator:

- (1) Good verbal and written communication skills;
- (2) The ability and willingness to travel throughout Iowa and to work prolonged and unusual hours;
- (3) Knowledge of Iowa Code chapter 20, the agency's rules, and principles and practices of contracts, public finance, and labor relations; and
- (4) The ability to conduct evidentiary hearings in a fair and impartial manner, develop an accurate record, and prepare and issue clear, reasoned and timely awards. For purposes of this subparagraph, "timely" means within 15 days after the interest arbitration hearing pursuant to Iowa Code section 20.22(9) or in a time frame established by an impasse agreement entered into pursuant to Iowa Code section 20.19.

b. For listing on the roster as a grievance arbitrator:

- (1) Good verbal and written communication skills;
- (2) The ability and willingness to travel throughout Iowa and to work prolonged and unusual hours;
- (3) Knowledge of arbitral principles and practices, contracts, and labor relations; and
- (4) The ability to conduct evidentiary hearings in a fair and impartial manner, develop an accurate record, and prepare and issue clear, reasoned and timely awards. For purposes of this subparagraph, "timely"

means within the time frame established by the parties' collective bargaining agreement entered into pursuant to Iowa Code chapter 20.

...

**621—14.9(20) Procedures for discipline and removal.**

**14.9(1) Grounds.** Probation, suspension, or removal from the roster may be based upon one or a combination of any of the following, including but not limited to:

a. Failure to comply with statutory provisions, the agency's administrative rules, and agency guidelines and policies;

b. Delinquency in submitting awards;

c. Existence of a conflict of interest as described in subrule 14.8(1) that requires exclusion from the roster;

d. Failure to disclose to the board or the parties any conflict of interest as described in subrule 14.8(1);

e. Failure to demonstrate the requisite knowledge and abilities listed in subrule 14.5(3);

f. Any other reason for which the board deems discipline or removal to be in the best interest of the agency, its constituents, or the public at large.

Count I – Written Communication Skills

This count requires little discussion. As noted previously, Respondent has admitted the accuracy of this charge. Although one might view his testimony concerning how he perceives the plethora of obvious and embarrassing language errors appeared in his decision as an attempt to minimize his own culpability, he acknowledged his ultimate responsibility for the decision and that the errors are simply unacceptable.

Based upon our review of Respondent's decision, as well as his acknowledgement of the accuracy of the allegations contained in this count, we

conclude that counsel for the Public Interest has established that the existence of these errors demonstrate that Respondent does not possess, or in this case failed to demonstrate, the good written communication skills required of arbitrators by 621—14.5(3), and that this conclusion provides grounds for discipline in accordance with 621—14.9(1)(e) and (f).<sup>7</sup>

Count II – Clear and Reasoned Award.

Under our rules, a roster arbitrator’s failure to demonstrate the ability to prepare and issue a clear and reasoned award constitutes ground for discipline. See 621—14.9(1)(e) and 621—14.5(3).

In our view, a reasoned award, at a minimum, states the arbitrators’ reasons for the decision, based upon an impartial and accurate view of the evidence, which reasons fairly meet and deal with the substantial arguments made by the parties.

Respondent’s decision in this case fails to demonstrate these minimum expectations. The decision contains substantive inaccuracies, as well as significant omissions which resulted in a failure to meet and deal with AFSCME’s substantial arguments. While a number of these inaccuracies and omissions might be viewed by some as only relatively inconsequential examples of possible inattentiveness or carelessness, we are particularly troubled by some.

Primary among these is Respondent’s treatment of what was the major

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<sup>7</sup> We do not view these errors as supporting discipline on the basis of 621—14.9(1)(a) however, because we are unable to identify any statutory provision, agency rule, guideline or policy which was violated by Respondent’s issuance of a sloppy, seemingly-unedited decision replete with typographical, grammatical, punctuation, spelling and word usage errors.

thrust of AFSCME's argument that just cause did not exist for Ackerman's termination—that she had forthrightly explained the facts of her daughter's situation to Reynolds and had been told that her daughter could be added to the insurance coverage. As noted in our findings of fact, the arbitration record included no less than six distinct items of evidence which supported AFSCME's argument that Ackerman enrolled her daughter for the 2014 plan/calendar year (the only year upon which the termination was based, according to the letter of termination) based upon what Reynolds had told her the previous year.

Rather than dealing with this central argument, however, Respondent reduced it to little more than an aside, virtually (and erroneously) dismissing it as “not supported by any evidence,” rather than addressing the evidence (and AFSCME's argument) and indicating the reason(s) why he found it not credible or persuasive. This obvious failure to base the award on an accurate view of the evidence and to fairly meet and deal with a party's argument, show a failure to possess or demonstrate the ability to prepare and issue a reasoned award (and constitute reasons why discipline is in the best interest of the agency, its constituents or the public at large). We agree with counsel for the Public Interest that this erroneous representation of the arbitration record could well leave one with the impression that Respondent did not seriously review it prior to the

issuance of his decision.<sup>8</sup>

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<sup>8</sup> We again emphasize that our view of Respondent's discussion of this prong of AFSCME's

We are also particularly troubled by Respondent's failure to accurately relate the real import of the Iowa Supreme Court Attorney Disciplinary Board's final action on the complaint against Ackerman (*i.e.*, a finding that no ethical violation had been shown), and by his failure to even note that this amounted to AFSCME's successful defense as to one of the three grounds upon which Ackerman's termination was based. This is another example of a failure to possess or demonstrate the ability to prepare and issue a clear and reasoned award within the meaning of 621—14.5(3), or another reason why discipline is in the best interest of the agency, its constituents or the public at large, within the meaning of 621—14.9(1)(f).

Also significant is Respondent's failure to mention, much less meet AFSCME's substantial argument based upon the facts revealed by its arbitration Ex. I concerning the attorney/ALJ at IWD who was found by the Attorney Disciplinary Board to have committed an ethical violation by making misrepresentations under oath to a legislative committee, yet was not disciplined by IWD. Respondent did discuss the other example of discipline (AFSCME arbitration Ex. N) where a 10-day suspension had been imposed upon an employee for inappropriately adding others to his insurance coverages and distinguished that case, in large part, on the basis of that employee's lack of legal training and what Respondent viewed as Ackerman's greater duty as a legal

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argument is limited to the question of whether his misstatement of the record/failure to acknowledge the evidence in support of the argument shows that he does not possess or failed to demonstrate the ability to prepare and issue a clear and reasoned award, or whether these defects constitute another reason why discipline should be imposed. We offer no opinions concerning what credit or weight should have been attributed to this evidence.

professional. But his decision completely ignored the evidence about the not-so-readily distinguishable case of the other ALJ who, presumably, also possessed a greater duty to be truthful and who, unlike Ackerman, actually did commit an ethical violation involving dishonesty. This omission, even if the result of mere inattentiveness or carelessness, constitutes another example of Respondent failing to meet and deal with a substantial argument, and thus to possess or demonstrate the ability to prepare and issue a clear and reasoned award.

Without minimizing our concern regarding other misstatements or omissions mentioned in our findings of fact, we finally express our view that Respondent's failure to even note the existence of the uncontroverted evidence that Ackerman removed her son from the insurance coverage in the year after he reached the age of 26—evidence from which one might conclude that Ackerman did not engage in a calculated effort to defraud the State (a significant issue judging from Respondent's discussion of AFSCME arbitration Ex. N)—constitutes yet another example of his failure to fairly meet and deal with a substantial argument of a party and thus to prepare and issue a clear and reasoned award.

It is unnecessary to detail and comment upon other misstatements or omissions present in Respondent's decision. Those noted above provide ample support for our conclusion that counsel for the Public Interest have established that Respondent does not possess, or in this case failed to demonstrate, the ability to prepare and issue a clear and reasoned award as required by 621—14.5(3), and that grounds for discipline in accordance with 621—14.9(1)(e) and (f) therefore exist.

Even were one to dispute the idea that basing one's decision on an accurate view of the evidence and fairly meeting the substantial arguments of the parties is reasonably included within the requirement that an arbitrator demonstrate the ability to prepare and issue a reasoned award, we would view the failure of an arbitrator to fulfill those reasonable expectations as a reason why discipline would be in the best interest of the agency, its constituents, or the public at large as contemplated by 621—14.9(1)(f).<sup>9</sup>

We are well aware of the Iowa Supreme Court's view of the purpose and value of arbitration:

Arbitration is valued as an alternative dispute resolution mechanism because it provides a speedy and efficient remedy. *See generally Wesley Ret. Servs., Inc. v. Hansen Lind Meyer, Inc.*, 594 N.W.2d 22, 27 (Iowa 1999)(interpreting arbitration statute to promote speed and efficiency of process); *Modern Piping, Inc., v. Blackhawk Automatic Sprinklers, Inc.*, 581 N.W.2d 616, 621 (Iowa 1998)(noting purpose of arbitration is "to obtain a speedy, inexpensive and final resolution of disputes"), *overruled on other grounds by Wesley Ret. Servs., Inc.*, 594 N.W.2d at 29. Furthermore, this court has observed that "[a] refined quality of justice is not the goal in arbitration matters. Indeed such a goal is deliberately sacrificed in favor of a sure and speedy resolution." *LCI, Inc., v. Chipman*, 572 N.W.2d 185, 162 (Iowa 1997).

*State v. PERB*, 744 N.W.2s 357, 362 (Iowa 2008).

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<sup>9</sup> As we concluded as to Count I, we do not view the misstatements and omissions contained in Respondent's decision as supporting discipline on the basis of 621—14.9(1)(a) because we are unable to identify any statutory provision, agency rule, guideline or policy which was violated by Respondent's issuance of a decision which is not based upon an accurate view of the record and does not fairly meet the major arguments of the parties. Nor do we conclude that counsel for the Public Interest has established grounds for discipline based upon the absence of cited authority in Respondent's decision, his conduct of the hearing, or his development of an accurate record.

Producing a “refined quality of justice” is not the goal of our rules concerning the necessary knowledge and abilities of PERB roster arbitrators. We fully recognize that relative brevity in arbitration awards facilitates a speedy resolution of the parties’ dispute and reduces the expense of arbitration proceedings. We expressly disclaim any intention to hold roster arbitrators to the same standards as are applicable to agency decision-makers operating under the requirements of Iowa Code chapter 17A, or to require in all cases the detailed findings and discussion we felt were necessary in our explanation and consideration of this case.

Nor do we suggest that detailed analysis of every piece of evidence or every argument of every party, no matter how insignificant, must result in a finding of fact or extended discussion. But what is expected and required of PERB roster arbitrators is a clear and reasoned decision which, at a minimum, states the reasons for the decision based upon an impartial and accurate perception of the record, which reasons fairly meet and deal with the substantial arguments presented. Relative brevity in a decision which meets these expectations is likely a virtue, but cannot be so valued that substantive misstatements of the record and clear failures to meet the parties’ substantial arguments are sacrificed.

Count III—Fairness and Impartiality.

PERB subrule 621—14.3(2) provides that arbitrators shall conform to the ethical standards set forth in the Code of Professional Responsibility for Arbitrators of Labor Management Disputes, as approved and published by the National Academy of Arbitrators, Federal Mediation and Conciliation Service, and

the American Arbitration Association (the Code). Section 1(A) of the Code addresses the general qualifications required of arbitrators, among them the following:

1. Essential personal qualifications of an arbitrator include honesty, integrity, impartiality and general competence in labor relations matters.

An arbitrator must demonstrate ability to exercise these personal qualities faithfully and with good judgment, both in procedural matters and in substantive decisions.

Section 1(C)(3) of the Code further provides:

3. An arbitrator shall not engage in conduct that would compromise or appear to compromise the arbitrator's impartiality.

Count III of the Statement of Charges in this case alleges that Respondent's failure to acknowledge the existence of evidence admitted in support of the grievance, to discuss and analyze its effect, and his inclusion of clear inaccuracies in his decision demonstrates a lack of the fairness and impartiality required by the Code and thus constitutes a violation of subrule 621—14.3(2) and grounds for discipline in accordance with 621—14.9(1)(a) and (f).

This count involves many of the same inaccuracies and omissions discussed regarding Count II above, although in a different context. In Count II the question posed was whether the inaccuracies and omissions amounted to a failure of Respondent to possess or demonstrate the ability to prepare and issue a reasoned award. In this count, the question is whether those inaccuracies and omissions demonstrate that Respondent was not fair and impartial in deciding

the Ackerman grievance.

We agree that an arbitrator's failure to acknowledge the existence of relevant evidence in support of a grievance, to deny the existence of relevant evidence, or to include inaccuracies which tend to undermine the validity of a grievance in a decision could under some circumstances justify an inference that the arbitrator was not impartial. As we indicated in our discussion concerning Count II above, we have found that Respondent's arbitration decision contains a number of inaccuracies and omissions. The question we thus confront at this point is whether we are willing to infer from the existence of those inaccuracies and omissions that Respondent was not impartial in his handling of the Ackerman grievance.

The record before us contains no direct evidence of unfairness or partiality. Following our review of the entirety of that record, we are unwilling to infer a lack of fairness or impartiality from nothing more than the substantive inaccuracies or omissions discussed in our consideration of Count II. We attribute those defects instead to Respondent's inattentiveness or carelessness in his consideration of the record and the production of his decision. Counsel for the public interest bears the burden to establish Respondent's noncompliance with the Code. We conclude that burden has not been met in this case, and that counsel for the public interest has thus failed to establish that grounds for discipline based upon a lack of fairness or impartiality exist.

*The appropriate discipline.*

Having concluded that grounds for discipline exist under 621—14.9(1)(e) and (f) for the reasons discussed in connection with Counts I and II of the Statement of Charges, the question we now confront is what discipline, if any, is appropriate under the circumstances.

Our purpose in imposing discipline under rule 621—14.9 is not to punish the individual arbitrator, but to attempt to ensure that arbitrators on the PERB roster perform their roles impartially and that their work meets at least the minimum level of quality that PERB, the parties, their constituents and the public have a right to expect from neutrals on PERB's roster. Discipline is also imposed in order to improve the performance of the arbitrator disciplined and to provide arbitrators and parties with notice of PERB's expectations of roster arbitrators, and thereby to deter others from the type of conduct which resulted in discipline. We will determine the appropriate discipline on a case-by-case basis, considering the aggravating and mitigating circumstances in order to appropriately tailor the sanction imposed.

This is the first arbitrator complaint case to come before the Board since the adoption of 621—chapter 14 in 2014. Prior complaints were addressed by written policy initially adopted in 1991 and last amended in 2010. *See* Public Interest Ex. 3 admitted at the PERB hearing. Although the procedure for the filing of complaints and for their disposition under the former policy did provide arbitrators with notice and opportunity to be heard in response to a complaint, that procedure was altered substantially by the adoption of 621—chapter 14 in order to provide arbitrators who were the subject of complaints with even greater

due process by requiring a preliminary finding that the complaint has a basis in fact, and for a contested case hearing before the Board in the event such a finding is made. Dispositions of prior complaints against arbitrators, unlike the present case, were not treated as contested case decisions within the meaning of Iowa Code chapter 17A. There is, however, evidence in the record before us concerning prior complaints against arbitrators.

Public Interest Ex. 4 consists of a summary of the 15 complaints filed against PERB-listed neutrals between 1992 and 2011. Of those, one complaint was withdrawn, one was found to be without merit following a preliminary investigation and four arbitrators who were the subject of a complaint withdrew from the PERB roster upon receiving notice of the complaint against them. Two arbitrators were not disciplined but were contacted to review and discuss what were viewed as valid concerns raised by the complaints. In the other cases discipline ranging from the issuance of letters of concern to suspension for one year were issued.

The record before us, however, does not include the awards or decisions issued by the disciplined arbitrators, much less the entire record of the arbitration which precipitated the complaint. We thus have little basis in this record to compare the defects in those awards with those present in Respondent's decision. Public Interest Ex. 4 does reveal, however, that one of the complaints involved factual errors in the arbitrator's interest arbitration award, which resulted in the Board's issuance of a letter of reprimand in 1995 (Public Interest Ex. 5E). It thus appears that the award in that case bears at least some

similarity to the decision Respondent issued in the Ackerman grievance.

Because of the fundamental similarities between the knowledge and abilities required by both the former policy and the current rule, we think it would be appropriate for us to consider sanctions imposed in similar situations which arose under past policy, although we would not consider ourselves bound by those cases decided by earlier Boards, who may have had more liberal or strict views on what would constitute an appropriate disciplinary sanction under a given set of circumstances.

But here we have no way of determining whether the award of the arbitrator reprimanded in 1995 was more or less flawed than the decision Respondent produced in the Ackerman grievance, and thus whether we agree that a reprimand was the appropriate discipline under the circumstances. If the shortcomings of that arbitrator and others who were merely reprimanded in prior cases were as serious as those we have found in Respondent's decision, we would disagree with the discipline imposed in those cases, believing that a reprimand would be insufficient to accomplish the purposes of arbitrator discipline.

We view the requirement that arbitrators issue clear and reasoned awards as including, at a minimum, the requirement that the award not only meet the significant issues presented by the case but also the arguments of the parties concerning those issues, and that it address the evidence admitted in support of those arguments, whether deemed to be credible or persuasive by the arbitrator or not.

We view Respondent's decision as falling well short of the standard of

quality the Board reasonably expects of arbitrators who are members of the PERB roster. While we would likely not take action beyond a letter of concern or letter of admonition based only on the errors discussed in connection with Count I, those admitted shortcomings are coupled with the substantive misstatements and omissions discussed in connection with Count II. While we have indicated our unwillingness to infer from those misstatements and omissions a lack of impartiality on Respondent's part, we view those errors and omissions as serious matters requiring that a disciplinary sanction be imposed in an attempt to ensure that Respondent does not repeat them and to convey to other arbitrators and parties to arbitrations that awards containing such errors and omissions fall below the standard of quality we expect of PERB-listed arbitrators.

The record does provide information concerning the reasoning behind the Board's imposition of a one-year suspension on the individual identified as Arbitrator D by Public Interest Ex. 5. In that case the arbitrator of an interest dispute pursuant to Iowa Code section 20.22 failed to honor the parties' section 20.19 agreement to separate issues which would, in the absence of such agreement, have been properly treated as a single impasse item, and thus impermissibly combined what the parties had agreed would be separate. The arbitrator also suggested that a party amend its final offer on a wage proposal, then ruled the amendment would not be allowed when the other party objected, but then proceeded to award a proposal that neither party had placed before the arbitrator. And despite these plain errors, the arbitrator demonstrated a continued failure to acknowledge them, leaving the Board unconvinced that the

arbitrator understood the errors committed and that they would not be repeated.

That case is distinct from the instant case at least the respect that it arose out of an interest arbitration under Iowa Code section 20.19 and 20.22, rather than pursuant to the grievance procedures of a collective bargaining agreement, and thus involved conduct which violated the statute's terms. No violation of statute is suggested in the present case. The case of Arbitrator D does however, share the concerning element of the arbitrator's failure to acknowledge what we view as *obvious defects in the arbitration decision*.

While Respondent did acknowledge the errors described in Count I of the Statement of Charges, and offered to submit future awards to PERB for review prior to their issuance, he made no such acknowledgement of the inaccuracies and omissions raised by Count II. Respondent's counsel instead minimized the errors in Respondent's award, referring to them as "grammar mistakes" and indicating that the only issue in this case is "the grammar issue." And he attempted to rebut the complaint that Respondent had mischaracterized the Attorney Disciplinary Board's response to the complaint against Ackerman, pointing out that Respondent's decision contains a paragraph about it. This argument misses the point concerning the treatment Respondent accorded the Disciplinary Board's action. Respondent did mention the Disciplinary Board, but in an incomplete and misleading manner, by indicating that "the Iowa Supreme Court Disciplinary Board [sic] declined to further investigation [sic] this complaint," when in fact the Board had investigated the complaint, had found that Ackerman's human resources representative had told her the daughter

could be added to the insurance coverage, had concluded that no ethical violation had occurred, and dismissed the complaint. This mischaracterization of the Disciplinary Board's action and the omission of its significant findings and conclusions, rather than a total failure to note that a disciplinary complaint had been filed with the Board, is the matter which concerns us. We view Respondent's failure to acknowledge anything more than "grammar mistakes" as an aggravating circumstance in this case.

The Public Interest argues that the appropriate discipline in this case is the imposition of a one-year suspension from the grievance arbitration category of the PERB panel. Respondent suggests that a reasonable resolution would be for him to email future awards to the Board or its representative, prior to their issuance, in order to demonstrate that the defects he does acknowledge are not typical of his work product. We think neither proposal is the appropriate resolution here.

We reject Respondent's suggestion which, although not expressed in this manner, would seemingly involve the imposition of a probationary period with the advance submission of awards to PERB as a condition of that probation. We are leery of such a condition because it could easily raise questions about whether PERB's advance review of awards may have influenced the final result reached by the arbitrator. It is not our role to do so, and we will take pains to avoid any appearance, or even the suggestion, that PERB members or staff may have influenced the results of an arbitration. Additionally, any grievance awards submitted to us in advance of their issuance might well be viewed as open

documents available to the public, a result which would effectively deprive the parties to grievance arbitrations of their recognized right to not submit the award to PERB if a party does not wish to have it published.

Nor do we think the one-year suspension proposed by the Public Interest is warranted in this case. Although we have indicated that we view the defects in Respondent's decision as serious matters which resulted in a decision well below the standard of professionalism we expect from arbitrators on our roster,, Respondent's shortcomings in this case did not, unlike the situation of Arbitrator D, result in an award which was reached in violation of statutory provisions. And as we have previously indicated, we express no view whatsoever on the correctness or validity of the result reached by Respondent in this case, and recognize that a rational basis for the denial of the grievance may arguably have been present in the arbitration record even had Respondent's decision truly met the significant issues and the arguments of the parties concerning them, and had addressed the evidence admitted in support of those arguments.

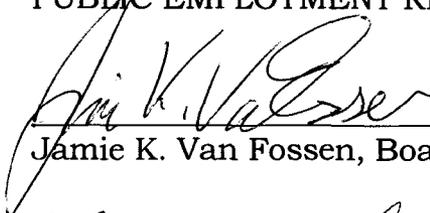
The substantive inaccuracies and omissions contained in Respondent's decision are aggravated by the embarrassing typographical, grammatical, punctuation, spelling and word usage errors and Respondent's failure to acknowledge anything more than grammatical mistakes. But we also take note of Respondent's long history of service as a mediator, fact-finder and arbitrator, the absence of any prior complaints against him in those roles and Respondent's expressed sensitivity to the need to fulfill his role impartially and without bias or prejudice, and view those as mitigating factors, at least to some degree.

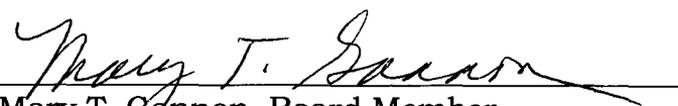
Under these circumstances we think the purposes of arbitrator discipline are best served by the imposition of a period of suspension. We do not, however, concur with the Public Interest's apparent position that a suspension should be limited to Respondent's listing in the grievance arbitration category of our roster. Unlike the situation of Arbitrator D, whose failures were of a statutory nature which could not be repeated in the context of a grievance arbitration, the defects in Respondent's award are of a nature which show Respondent's failure to possess or in this case demonstrate abilities equally applicable to both grievance and interest arbitration cases.

IT IS THEREFORE ORDERED that Arbitrator John L. Sandy is hereby suspended from all categories of our panel of arbitrators for a period of six months, during which his name shall not be included on PERB-issued lists of arbitrators requested by parties. This suspension is effective immediately, but does not apply to pending cases in which Respondent has been designated as the arbitrator but has not yet conducted a hearing on the matter or issued his decision or award.

DATED at Des Moines, Iowa, this 9<sup>th</sup> day of August, 2016.

PUBLIC EMPLOYMENT RELATIONS BOARD

  
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Jamie K. Van Fossen, Board Member

  
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Mary T. Gannon, Board Member

**Cormack, Member**, concurring in part and dissenting in part.

I concur with the majority in their reasoning and conclusion regarding Count I, and their conclusion regarding Count III, of the Statement of Charges as alleged against arbitrator Sandy.

Counts I and III

I agree with the majority that typographical and grammatical errors are found in the State/AFSCME (Ackerman) arbitration award issued by Sandy. Sandy agreed to that determination. He cited internal issues within his office that caused those errors to occur. Regardless of the reason, Sandy's name is on the award and he is fully accountable for those errors. Sandy assured this Board that those internal issues have been resolved and he will be more diligent in reviewing his awards prior to issuance.

PERB subrule 621—14.5(3) requires arbitrators to demonstrate good verbal and written communications skills. Because Sandy admittedly failed to demonstrate good written communication skills, I find ground for discipline pursuant to PERB subrule 621—14.9(1)(e) has been established. In my view, given his long positive work record with PERB, I have no reason to suspect this was not in fact an isolated incident. Nevertheless, it is the expectation of this agency that greater diligence will be exercised in proofreading arbitration awards prior to issuance.

In regards to Count III, I agree no evidence exists to support a finding that a lack of fairness or impartiality occurred. For the record, as will be more fully discussed below in my dissent, I disagree with the majority's

characterization of Sandy's award as filled with "clear" and "substantive inaccuracies or omissions," or that the record before us provides any evidence that Sandy's award demonstrates "inattentiveness or carelessness in his consideration of the record."<sup>1</sup>

Count II

I respectfully, but vehemently, dissent from the remainder of the majority decision. Through a plethora of words in an almost unheard of Board decision of 47 pages, the majority is trying to coerce a judgment that does not reflect past agency practice or current national arbitration standards. I will be much briefer in my dissent, but truth and brevity are not mutually exclusive. In fact, the clear and simple truth in this matter can be stated much simpler than the tortured logic that arrives at a perplexing majority conclusion. The reality is Sandy is being disciplined in an arbitrary and capricious manner by the majority in Count II for doing what any other arbitrator would reasonably do in his position. Simply put, the majority is disciplining Sandy more severely than any other arbitrator with comparable violations in the history of this agency and by default, is declaring his grievance arbitration award to be the worst in the 43 years PERB has existed. This is extreme, unprecedented and without merit.

I deem it important to preface my dissenting view on Count II by conceding that PERB, as an agency, is not an expert in arbitration. This is not stated as a criticism of our agency, but an admission of our limited

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<sup>1</sup> Majority Decision at 39.

involvement in arbitration proceedings, particularly grievance arbitrations. The Board and our professional staff does not participate or advocate in, or have any direct involvement in the arbitration process. We receive interest arbitration awards, but as far as grievance arbitration awards, we only come into possession of those when the parties mutually agree to publish them, which has considerably declined. Our review of the arbitration process comes into play after-the-fact when an arbitrator complaint is filed. Due to our lack of regular or meaningful involvement in actual arbitration proceedings, I think it is imperative we rely on expertise of representatives and other relevant arbitration authority to ensure we, as a Board, are not setting unprecedented standards or unreasonable expectations not seen in any other arbitration forum.

My fundamental disagreement with the majority's decision is quite simple – their analysis and conclusion is misguided. Their “minimum expectations” of a reasoned award are that the award “states the arbitrators’ reasons for the decision, based upon an impartial and accurate view of the evidence, which reasons fairly meet and deal with the substantial arguments made by the parties.”<sup>2</sup> They treat the term “reasoned,” defined as something “underpinned by logic or good sense,” as a checklist; consequently, their analysis fails to fairly consider the entire arbitration record before Sandy. Instead, the majority focuses on certain parts of the arbitration record in

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<sup>2</sup> Majority Decision at 32.

isolation to conclude that the award contained, what they deem to be, “substantive omissions.”

Sandy testified before the Board that he reviewed each and every arbitration exhibit. The majority has not shown this to be false. In terms of the “substantive omissions” as alleged in the Statement of Charges, I think the proper approach is to simply ask whether those omissions make sense given the issue (and arguments) before the arbitrator.

The record is clear that there was only one issue before Sandy – did the State have just cause to terminate Ackerman as required by the parties’ collective bargaining agreement?<sup>3</sup> In disciplinary cases, the employer carries the burden. Arbitral law shows that there are seven “tests” of just cause that arbitrators examine in evaluating just cause. Presumably, the only relevant “arguments” the parties make pertain to defending or attacking one of the “tests” of just cause. As Sandy testified, the utilization of these “tests” varies by case because not all aspects of just cause will be in dispute in every case. In the Ackerman case, only four of the seven “tests” were at issue: notice, proof, equal treatment and penalty. Sandy’s award addressed each one of the four “tests” that were at issue in this case. He highlighted the record evidence he found pertinent under each “test” and his decision reasonably flowed from the

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<sup>3</sup> The majority’s occasional references to “significant issues” before the arbitrator are somewhat misleading. To be clear, the parties stipulated there was only one issue before the arbitrator and Sandy accurately recognized that issue in his award. See PERB Joint Ex. 1B and 1C (the parties’ post-hearing briefs that specifically state only one issue is before the arbitrator); Joint Ex. 2 (arbitrator’s award stating only one issue before the arbitrator); See also Public Interest Ex. 5 (a prior discipline case where PERB concluded, in evaluating an arbitrator complaint, that in discipline arbitrations there is only one “core issue” before the arbitrator and that is whether the employer established “just cause.”)

evidence he found credible and pertinent, as evidence by his reliance upon it in the award. This should be the end of our inquiry whether the award is “reasoned” and we should find that Sandy’s award is “reasoned.”

The majority obviously disagrees and delves into much deeper examination of each piece of evidence. While they drop in periodic disclaimers that PERB’s role is not to “review the merits of the conclusions...or to substitute our opinion for Respondent’s on what evidence should or should not have been credited,” the majority’s approach inherently does just that. It interferes with the arbitrator’s authority to decide the credibility or probative value of evidence.

The majority takes great issue with the lack of coverage in Sandy’s award of the attorney disciplinary complaint and its findings. As the majority properly recognizes, the State was not arguing it had just cause based on a violation of the Iowa Rules of Professional Conduct for attorneys. The majority explicitly and accurately finds the State was basing their just cause burden on violations of the IWD work rules and the State of Iowa handbook.<sup>4</sup> Therefore, it baffles me they would find Sandy’s lack of discussion of the evidence pertaining to the ethics complaint as a “substantive omission.” Since the State, the party carrying the burden, did not rely upon the ethical violation as a basis for termination during the arbitration hearing, there was no need for Sandy to

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<sup>4</sup> In their findings of fact, the majority states: “The State’s brief (PERB Joint Ex. 1C) did not explicitly argue the third ground set out in Ackerman’s discharge letter (violation of the Rules of Professional Conduct for Iowa attorneys), but instead argued that the arbitration record established that Ackerman violated the cited IWD work rule and State of Iowa Employee Handbook provisions prohibiting dishonesty and the providing of false information, and that those violations constituted just cause for her discharge within the meaning of the parties’ collective bargaining agreement.” Majority Decision at 21.

“even note that this amounted to AFSCME’s successful defense as to one of the three grounds upon which Ackerman’s termination was based.”<sup>5</sup> I understand the ethics language was in the termination letter but by the time the parties argued the case before Sandy, that ground had become a nonissue for the parties, by choice for the State and by default for the Union.

The majority also finds issue that Sandy’s award “completely ignored the evidence about the not-so-readily distinguishable case of the other ALJ” who was found to have committed an ethical violation for making misrepresentations under oath to a legislative committee.<sup>6</sup> Equal treatment “test” looks at whether “enforcement of rules and assessment of discipline” is consistent.<sup>7</sup> As just discussed, the State was no longer relying on the ethical violation to prove just cause. Therefore, the same rule violations were not in play between Ackerman and the other ALJ and it had no applicability to the “equal treatment” test. What is important to note is that Sandy examined, and appropriately distinguished, the other comparable disciplines presented during the hearing that involved the same rule violations.

For reasons I fail to fully grasp, the majority also finds issue with Sandy’s “failure to even note the existence of the uncontroverted evidence that Ackerman removed her son from the insurance coverage in the year after he

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<sup>5</sup> Majority Decision at 34.

<sup>6</sup> Majority Decision at 35.

<sup>7</sup> Elkouri & Elkouri, Ch. 15.3.F.xiii (15-76).

reached the age of 26.”<sup>8</sup> They think this evidence might be probative on the issue whether Ackerman “engage[d] in a calculated effort to defraud the State.”

This evidence *might* be probative if intent to defraud was a requirement of the work rules under which Ackerman was disciplined. At the most basic level, the fact that Ackerman did not deliberately falsify documents to add her married son to her insurance makes no difference on the question whether she deliberately falsified documents to add her daughter. An arbitrator is within his authority to reach such a basic conclusion.<sup>9</sup> Additionally, in the IWD work rules and employee handbook sections pertaining to the State’s just cause burden, the language prohibits “[d]eliberate falsification of ...materials, or any other records related to work activities,” “giving false information to other government agencies” and “dishonesty.” The focus of the rules is on the false statement, not on the “the why” an employee falsified a document. That aspect goes to the motive for falsification, *e.g.*, securing health insurance benefits for a child. What happened to her son’s health insurance make no difference on the false statements Ackerman made regarding her daughter’s marital status.

In terms of the problematic “inaccuracy” the majority finds in Sandy’s award, I think it is only an issue when the majority chooses to read one sentence in isolation from the remainder of the discussion on a bigger point. The full discussion containing the phrase the majority finds problematic says:

State contends that Grievant knew on this date [of certification] her daughter was in fact married and knew the date of her

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<sup>8</sup> Majority decision at 35.

<sup>9</sup> Interestingly enough, not even Ackerman’s union representative during the investigative interview found this evidence to be relevant to the issue. See PERB Joint Ex. 1A at 11.

marriage...The State asserts that grievants actions clearly and identifiably reveal her dishonesty and specifically providing false information. The grievants (sic) arguments that she was only following Reynolds (sic) directive, is not supported by any evidence. She also contended that different definitions of marriage are conflicting on this issue.

(Emphasis added). They conclude that Sandy mischaracterized the record when he wrote that Ackerman's argument she was only following Reynolds' directive "is not supported by any evidence." When I read that phrase in its full context, I understand that when Sandy says "following Reynolds (sic) directive," he is speaking to whether Reynolds directed Ackerman to mark "unmarried" on the certification form, *i.e.* falsify the document. Sandy is correct – there is no evidence that Reynolds advised Ackerman at any point to mark "unmarried" on the certification form. Evidence shows Ackerman filled out the forms herself and marked the "unmarried" box when she knew her daughter was still legally married at the time.

On a policy level, I disagree with the majority's checklist approach of "minimum requirements" because it demonstrates a failure to meaningfully consider all the rules and arbitral practice that binds PERB arbitrators.

First, they fail to fully acknowledge or appreciate that arbitration is a "distinct dispute resolution institution,"<sup>10</sup> a recognition I find critical if we are tasked with evaluating whether an arbitrator fulfilled his duties.

In an arbitration[,] the parties have submitted the matter to persons whose judgement they trust, and it is for the arbitrators to determine the weight and credibility of evidence presented to them

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<sup>10</sup> Elkouri and Elkouri, *How Arbitration Works*, Ch. 1.1 (1-2) (BNA 7th Ed. 2012).

without restrictions as to the rules of admissibility which would apply in a court of law.<sup>11</sup>

The arbitrator, by virtue of his appointment to resolve the parties' dispute, is given the authority to determine the "weight and credibility" of the evidence. It is arbitral practice, and Sandy properly follows this practice, to admit all evidence the parties deem relevant or probative, but ultimately the arbitrator has authority to decide the significance or insignificance of admitted evidence to the core issue before the arbitrator. It is not this agency's place to second-guess those determinations. And it is certainly not this agency's place to require that arbitrators include discussion in the written award of evidence they deem to have no probative value, as the majority's view of a reasoned award seems to require.

Next, I also think the majority fails to give due weight to other rules governing arbitration practice. PERB subrule 621—14.3(2) states that arbitrators "shall conform to the ethical standards and procedures set forth in the current Code of Professional Responsibility for Arbitrators of Labor Management Disputes" (the Code). There are several provisions of the Code that have significance and ought to be considered, such as:

### **1. Responsibilities to the Parties**

#### **K. Fees and Expenses.**

An arbitrator must endeavor to keep total charges for services and expenses reasonable and consistent with the nature of the case or cases decided.

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<sup>11</sup> See *id.* at Ch. 1.A (8-4) (quoting *Instrument Workers Local 116 v. Minneapolis-Honeywell Regulator Co.*, 54 LRRM 2660, 2661 (E.D. Pa. 1963)).

## **5. Hearing Conduct**

### A. General Principles.

1. An arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument.

## **6. Post Hearing Conduct**

### C. Awards and Opinions

1. The award should be definite, certain, and as concise as possible.

a. When an opinion is required, factors to be considered by an arbitrator include: desirability of brevity, consistent with the nature of the case and any expressed desires of the parties; need to use a style and form that is understandable to responsible representatives of the parties, to the grievant and supervisors, and to others in the collective bargaining relationship; necessity of meeting the significant issues; forthrightness to an extent not harmful to the relationship of the parties; and avoidance of gratuitous advice or discourse not essential to disposition of the issues.

(Emphasis added).

The arbitral standard and practice is to allow all evidence in during the hearing to make sure parties have sufficient opportunity to present their evidence and argument. But once the matter is submitted to the arbitrator, as Sandy testified, he has to “balance” the entire record against the length of the award.<sup>12</sup> The length of the award is directly tied to the arbitrator’s responsibility to the parties in terms of keeping the fees charged reasonable. Nothing in the Code pertaining to “awards” specifically contains such requirements as the majority imposes.

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<sup>12</sup> Hearing Tr. 186:9.

It is noteworthy that Federal Mediation and Conciliation Services (FMCS), the agency that approves and publishes the Code for arbitrators, makes a distinction between a “decision” and an “award” in its regulations pertaining to arbitration services. In 29 C.F.R. § 1404.14, regulations pertaining to “awards,” the regulations only touch upon the timeliness for issuing awards and the rules regarding publication of awards. There are no other procedural or substantive criteria on what must be included in an award. However, on the topic of “decisions,” FMCS regulations explicitly state:

The conduct of the arbitration proceeding is under the arbitrator's jurisdiction and control, and the arbitrator's decision shall be based upon the evidence and testimony presented at the hearing or otherwise incorporated in the record of the proceeding.

29 C.F.R. § 1404.13 (emphasis added). The distinction between a “decision” and an “award” matters. I want to make it abundantly clear that I agree an arbitrator’s decision must be based on the evidence and testimony in the arbitration record. However, the majority is operating under the assumption that if an arbitrator fails to explicitly mention or analyze within the four corners of the written award a piece of evidence, that may not even be relevant to the issue before him, that is conclusive evidence that the arbitrator did not review and/or consider that omitted evidence, and the award is, *per se*, not “reasoned.” This assumption is not appropriate to make and it leads to flawed conclusions, as I think it did in this case.

Finally, the majority completely disregards the importance of reasonable expectations of parties for arbitration awards. The majority quotes an accurate explanation of arbitration as expressed by the Iowa Supreme Court, but

apparently fails to grasp the importance of its message. The Iowa Supreme Court has recognized,

Arbitration is valued as an alternative dispute resolution mechanism because it provides a speedy and efficient remedy. See *generally Wesley Ret. Servs., Inc. v. Hansen Lind Meyer, Inc.*, 594 N.W.2d 22, 27 (Iowa 1999) (interpreting arbitration statute to promote speed and efficiency of process); *Modern Piping, Inc. v. Blackhawk Automatic Sprinklers, Inc.*, 581 N.W.2d 616, 621 (Iowa 1998) (noting purpose of arbitration is “to obtain a speedy, inexpensive and final resolution of disputes”), *overruled on other grounds by Wesley Ret. Servs., Inc.*, 594 N.W.2d at 29. Furthermore, this court has observed that “[a] refined quality of justice is not the goal in arbitration matters. Indeed such a goal is deliberately sacrificed in favor of a sure and speedy resolution.” *LCI, Inc. v. Chipman*, 572 N.W.2d 158, 162 (Iowa 1997).<sup>13</sup>

The parties deliberately sacrifice a “refined quality of justice” in exchange for speedy and efficient resolution. In other words, when parties choose to arbitrate their disputes in lieu of resorting to the judicial system, their expectations change.

While peripherally noting “that relative brevity in arbitration awards facilitates a speedy resolution of the parties’ dispute and reduces the expense of arbitration proceedings,”<sup>14</sup> the majority nevertheless goes on for 18 pages to summarize the arbitration record before Sandy. They “expressly disclaim” that the same standards governing 17A decision-makers, or even the extent of “detailed findings and discussion” they write, do not apply to arbitration awards.<sup>15</sup> However, their approach in this case sends a mixed message. It

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<sup>13</sup> *State v. PERB*, 744 N.W.2s 357, 362 (Iowa 2008).

<sup>14</sup> Majority Decision at 37.

<sup>15</sup> Majority Decision at 37.

appears the only way for an arbitrator to issue a “reasoned” award is to write a comprehensive summary of the record. The only way Sandy could have avoided issuing an “unreasoned” award is to have discussed the “substantive omissions” the Board found, which comprises most of the 18 pages they write.

As previously mentioned, I deem it necessary for us to rely upon representatives who regularly participate in arbitration proceedings to educate us on reasonable expectations for an award. This Board heard testimony from the State representative in the State/AFSCME (Ackerman) arbitration hearing that the award was up to par with his expectations. Specifically, the State’s representative testified that Sandy’s award is “consistent with what [he has] seen arbitrators produce.”<sup>16</sup> The majority disregards this evidence.

Even more persuasive evidence that Sandy met the parties’ expectations and they have no issue with his work product is that they have selected Sandy to decide their grievances three more times after the issuance of the Ackerman award. Let me emphasize, the very parties with direct observation of how Sandy conducts a hearing and who received his award, continue to select him.

The majority chooses to discount this evidence by inventing a new definition of “selected” that is unsupported by the record and common sense. None of the witnesses even alluded to the conclusion the majority now attempts to force – the term selected “does not mean the parties necessarily agreed upon the identity of the arbitrator.”<sup>17</sup> Unless there is evidence I missed from the record that the parties do a random drawing to “select” their

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<sup>16</sup> Hearing Tr. 144: 13-14.

<sup>17</sup> Majority Decision at 4, footnote 1.

arbitrator, I can safely say that the word selected in this context means what it means in every other context. If the majority wishes to invent a new definition of “selected” because they see no other way to discredit evidence that Sandy’s performance as an arbitrator and his written awards sufficiently meet the parties’ expectations to the extent they keep selecting him to arbitrate their dispute – that is their prerogative. But, it is not supported by any recognized definition or actual practice in the field.

Sandy is being set to a standard that I feel very few, if any, other arbitrators would meet.

*Appropriate Discipline*

I agree with the majority that the extent of typographical and grammatical errors present in Sandy’s award is unacceptable and contrary to our rules requiring arbitrators to have good written communication skills. Looking at the big picture, this is a relatively minor offense but should still be sanctioned by this agency.

The importance of this case does not escape me as it is the first arbitrator complaint brought pursuant to chapter 14 of PERB’s rules. What is equally present on my mind, however, as I think about the appropriate discipline to impose in this case is the history of PERB’s discipline of other arbitrators that served on our qualified-arbitrator roster. Prior to the adoption of chapter 14, PERB had an internal policy dictating the requisite knowledge and abilities for arbitrators. Those requirements, dating back to 1991, are identical to the language as contained in PERB subrule 621—14.5(3)(b). If I

possess any sense of fairness to arbitrator Sandy, I find it necessary to recognize the adoption of chapter 14 did not wipe the slate clean as far as what PERB, historically, has deemed appropriate for various arbitrator complaints.

In considering the record before us, it is indisputable that the most discipline PERB has ever issued to an arbitrator with comparable issues as alleged here is a letter of reprimand or admonition. Most of the time, PERB contacted the arbitrator to discuss its concern following an investigation. I find Sandy's typographical and grammar errors are most in line with the facts contained in arbitrator B complaint, contained in Public Interest exhibit 5B. In addition to misstatements regarding financial data, PERB found arbitrator B's award also contained "several unclear and incomplete sentences." The resolution was to contact the arbitrator "to discuss the specific problems with the award" and "suggest greater diligence in the future." In coming to its conclusion, PERB recognized that arbitrator B's award at issue "appear[ed] to be an anomaly, rather than representative of a pattern of carelessness in construction of awards."<sup>18</sup>

If a discussion with the arbitrator, or even a letter of reprimand outlining the concerns, were an available option under chapter 14 of our rules, I would consider that the proper sanction. Under the new administrative rules, that is unfortunately not an option. Instead, given an option of no punishment whatsoever or some form of probation or suspension, I believe that the proper sanction would be a probationary period for this relatively minor offense. The

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<sup>18</sup> See Public Interest Ex. 5B.

extent of grammar and typographical errors made in this award appear to be an “anomaly” when I review Sandy’s previous awards, and that factor should be given weight as it was in discipline of arbitrator B. The probation period would end upon Sandy submitting an award to PERB, after its issuance and with approval from both parties involved, for us to confirm that the issues were taken seriously and are in fact resolved.

The imposition of a 6-month suspension by the majority, irrespective of the fact they also found a violation of Count III, is extreme. Even more troubling is that this sanction is completely unprecedented in PERB’s 43-year history. In imposing this sanction, the majority blatantly disregards prior discipline cases that are similar to the allegations presented in this complaint. In the case of arbitrator E, the arbitrator acknowledged that he misunderstood some of the evidence and this prompted one of the parties to file a complaint alleging the “award contains erroneous factual findings not consistent with the record.”<sup>19</sup> Arbitrator E received a letter of reprimand.

No two complaints will contain identical issues, but the issues as found with Arbitrator E and Arbitrator B, discussed above, are similar enough to warrant consideration by the majority. In the 43 years PERB has existed, the duration of suspension as imposed by the majority here has never been done in comparable complaints. The majority finds great fault with Sandy’s award for not discussing one prior discipline case they think pertained to equal treatment in the Ackerman case. However, the majority disregards all prior arbitrator

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<sup>19</sup>See Public Interest Ex. 5E.

discipline cases when deciding on the appropriate discipline in this case. I hope the irony of their action does not escape them.

### Conclusion

This is an extreme decision by the majority. The parties involved have picked Sandy over and over again as their arbitrator of choice. The very parties involved in the Ackerman case have continued to choose Sandy in three other matters. Those parties have a direct investment in Sandy issuing “clear and reasoned” awards and those parties have continued to choose Sandy to resolve their grievances.

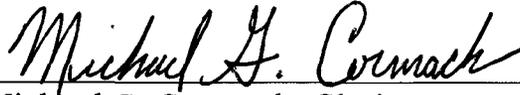
As one Board member who voted for the chapter 14 rules, it was my perspective that arbitrator complaints will be evaluated based on a recognition of the distinct nature of arbitration and giving due consideration to the rules and common practice governing arbitration. In supporting the ideal of an independent arbitration system, I am highly concerned that the ultimate net effect of imposing sanction on Sandy for the “omissions” the majority has decided are “substantive” is that all arbitrators will lengthen their awards out of caution, try to write to a style that a micromanaging agency has imposed on them instead of national industry standards, increase cost to participants, delay the timeliness of awards and ultimately erode that independence. Yes, this agency should impose swift and bold sanctions upon arbitrators who do not meet the requirements of chapter 14. But, the key question is where that threshold should be established?

Given the standard and approach set in this decision, virtually every arbitrator will proceed with extreme caution and the number of appeals under these rules will increase greatly. I can guess that hardly any arbitration award would meet the standard of extensive summary and analysis of evidence, regardless of the arbitrator's evaluation of its probative value, which is sought by the majority. This punitive standard does not serve the law well, the participants in this process well or the people of Iowa well. I fear this may likely lead to a burdensome and inefficient delivery of justice.

Wholeheartedly, I respectfully disagree with the majority in this matter.

DATED at Des Moines, Iowa, this 9th day of August, 2016.

PUBLIC EMPLOYMENT RELATIONS BOARD

  
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Michael G. Cormack, Chair