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Iowa Department of Inspections and Appeals
Division of Administrative Hearings
Wallace State Office Building
Des Moines, Iowa 50319

CHAD KOST, Appellant, and STATE OF IOWA (DEPARTMENT OF CORRECTIONS), Appellee.	PERB Case No. 102652 DIA Case No. 23PERB0006 PROPOSED DECISION and ORDER

The hearing in this case was held on January 24, 2023. Chad Kost ("Kost") appeared and provided testimony; he was represented by Earlene Anderson. The State of Iowa, Department of Corrections, ("DOC") was represented by Andrew Hayes. Warden Mike Heinricy ("Warden Heinricy") appeared and testified. The entire administrative file, including the parties' exhibits, was admitted into the record, and the record was held open until March 31, 2023, for closing briefs, which were received. The matter is now fully submitted.

FINDINGS OF FACT

A.

Kost commenced working for DOC on August 1, 2007, and at the time of his separation in 2022, he was a correctional officer for the Iowa Medical and Classification Center located in Coralville, Iowa. App. Ex. 3, at p. 1. On December 19, 2021, Kost contacted DOC to take unscheduled sick time for his eight-hour scheduled shift that day due to his right arm and hand being "completely numb," making him barely able to dress himself and unable to carry out his duties at DOC. Id., Tr. at p. 58. Unbeknownst to Kost, at the time he called in sick, Kost did not have sufficient, accrued sick time to cover his entire eight-hour shift; he was .14 hours short on sick time. Tr., at p. 24. He did, however, have over two hours of compensatory leave available from overtime. Id., at p. 64.

At the time Kost made his request for leave, DOC did not have any *published* policy on the use of compensatory leave, including whether compensatory time could be used to make up the difference between a shortcoming in accrued sick time and the hours of leave requested for an illness. The section of the employee handbook on leave states in pertinent part:

> Employees must have applicable leave hours equal to or greater than an absence. Employees that do not have sufficient leave hours for an absence must request approval for leave without pay from the Warden[.] Leave without pay that is denied shall be considered unauthorized.

Ex. S-8, at p. 3. The handbook then goes on to state sick time is for "illness," but it is silent on the issue of whether only sick time is "applicable leave" for an absence due to medical reasons. The handbook does

acknowledge indirectly the existence of compensatory leave, through noting some employees are not entitled to unofficial forms of it, and compensatory time, through stating: "Per DAS-HRE Administrative Rule 53.11(5), regular compensatory time is limited to 80 hours before it is paid off." Id., at p. 6. The handbook does not state the conditions under which an employee may use the accrued compensatory leave in lieu of other accrued leave, although the Department of Administrative Service's ("DAS") rules concerning compensatory time under Rule 53.11(5) do state: "Compensatory leave accrued in accordance with 11--subrule 53.11(5) shall be granted at the request of the employee whenever possible. However, the appointing authority need not grant a request for compensatory leave if granting the leave would cause an undue disruption." 11 Iowa Administrative Code § 63.7. The handbook further details an escalating disciplinary process for missing work without enough leave, stating:

> Instances of unauthorized leave without pay shall be subject to the following violation schedule:
> 1. 1st unauthorized leave – Written Reprimand
> 2. 2nd unauthorized leave within one year - 1 day paper suspension.
> 3. 3rd unauthorized leave - 3 day paper suspension.
> 4. 4th unauthorized leave - 5 day paper suspension.
> 5. 5th unauthorized leave - Termination.

Id., at p. 3.

As for any *unpublished* policy concerning the appropriate use of compensatory leave, it appears undisputed correctional officers like Kost were permitted to accrue compensatory time and utilize it in lieu of vacation leave. Tr. at p. 41 (Warden testifying that "comp time can be accrued by somebody in a correctional officer and other positions, but for this case he was a correctional officer, and they accrue that for the purpose of being able to use that in replacement of vacation time, or they can choose to cash it out if they so choose as well."). The record is in tension, though, on whether compensatory time could be used for sick time, at least outside of the FMLA context, with Warden Heinricy testifying it was the policy for years that compensatory time could not be used for sick time and such was a general policy. See, e.g., id., at 23-24, 48, 50. As for the source of this policy, Warden Heinricy indicated he was unware of its origins. Id., at p. 43 ("Q: [W]hat's the source of the policy that you can't use comp time for sick leave? . . . [A:] I don't know the answer to that, I just know it's a rule."). By contrast, Kost testified he had heard that there were rare occasions where vacation and compensatory time was allowed to be used when insufficient sick time existed, stating in part: "In all honesty, no, I did not believe I would be disciplined. I know in rare cases they use time to cover sick leave when you don't have it, whether it's vacation, and it's all hearsay, but I've heard that they've let employees use comp time. I didn't feel that I had to use either one. I honestly believed I had enough sick leave that day." Id., at p. 59. What is clear is that there was no training provided to Kost on the use of compensatory leave outside of the aforementioned leave manual. Id., at p. 63 ("[Q.] Did you receive any separate workbook, training, or instruction, to the best of your recollection, on the use of compensatory time, apart from the statements that are in Exhibit S-8? [A.] No, sir.").

After calling in sick on December 19, 2021, without enough sick time to fully cover his scheduled shift, DOC became aware of the issue and notified Kost, who filled out a leave request on December 22, 2021, to use his accrued compensatory time to make up the difference. Ex. S-5, at p. 1. Warden Heinricy denied the request to use the compensatory time to cover the .14 hours Kost was short on sick time, which effectively made the leave "unauthorized" in DOC's view. See e.g., Ex. S-1, at p. 1. Of note, Warden Heinricy credibly testified he did not think he had discretion when denying the leave request. Tr., at pp. 43-44 ("[Q.] So more broadly speaking, it would be fair to say you did not consider whether compensatory

time could even be an option because from your understanding, there's some rule somewhere that says it can't be used for sick time; is that correct? [A.] Yes[.]"). This was in tension with the State's position at the hearing, where its counsel noted discretion existed as a matter of law. Id., at p. 68 ("The State's position is that it does have the discretion to grant or refuse the use of comp time."). Because Kost had four previous disciplines for unauthorized absence (spanning from September 9, 2020 to April 5, 2021), Warden Heinricy authorized the termination of Kost' employment, which occurred on January 25, 2022. Ex. S-1, at p. 1.

The January 25, 2022, disciplinary letter issued to Kost stated in relevant part: "This action is being taken based on the findings of an investigation that was initiated due to unauthorized leave use. Your request for authorized leave on December 19, 2021 [was] denied by the Warden. During the course of the investigation, it was found that you did not have sufficient hours for the absence requested." S-1, at p. 1. The letter concluded such was a violation of IDOC Policy AD-PR-08 Attendance, Timekeeping, and Leave- Section B.1 and B.2, which is the foregoing sections on leave without pay and the escalating disciplinary schedule for such. Id. As the letter stated, there was an investigation into this matter prior to the termination, and of the termination decision itself, Warden Heinricy stated there was nothing exceptional about Kost's service record to warrant overlooking the matter, such as what might occur in the situation of a new employee who became ill for several days without working enough time to build up sick time. See, e.g., Tr., at pp 45-46.

B.

On January 25, 2022, two days after his employment was terminated, Kost filed a State Employee Grievance Form, challenging the cause for his separation. Appellant Ex. 2. In the Grievance form, Kost stated in part: "Dec. 19, 2021, I called in sick – my right arm was completely numb and had no feeling in my fingers – (I was short roughly 8 mins of a full day of sick leave. I asked if I could use comp time to cover the 8 mins and was denied because of policy. I had 2 ¾ hours of comp." Id. On March 2, 2022, DAS denied the claim, noting: Kost held a merit-protected position; the facts of this case concerning the shortcoming in sick time were undisputed; and a policy existed preventing compensatory time from being used for sick time. Ex. S-3. DAS's denial considered the seven factors that often bear on whether just cause existed for a separation, and as for the notice and reasonableness of the rules factors, the denial stated:

> 1. Notice: Grievant received written forewarning of the probable or possible consequences of his conduct. Grievant most recently signed an Acknowledgement of Receipt of the relevant work rules on July 2, 20215. Moreover, Grievant has been employed at IMCC for a significant time knew or should have known the relevant work rules or policies. As such, the undersigned finds Grievant has adequate notice of that discipline could result from his misconduct.
>
> 2. Reasonable Rule or Order: The DOC work rules and policies implicated in this case are reasonably related to the orderly, efficient, and safe operation of IMCC. Management has a clear need for its staff to follow the rules governing attendance to operate safely and efficiently. Accordingly, the undersigned finds that Management has a reasonable expectation that IMCC staff adhere to the leave rules at IMCC.

Id., at p. 3. Of note, the denial does not specifically state the source of the policy that compensatory leave could not be used for sick leave, commenting at most: "Management claims that this instance of Grievant taking unauthorized leave warranted termination based on the clearly stated Attendance, Timekeeping, and Leave policy violation schedule." Id., at p. 2.

On March 21, 2022, Kost filed an appeal of the DAS denial, triggering the present proceeding. In the appeal, Kost's challenge to the separation shifted grounds with him stating in part he was let go without just cause for "incidents of forced sick leave (Covid) use" and how disciplining him for such was against policy during the pandemic. State Employee Grievance or Disciplinary Action Appeal, at p. 1. DAS reiterated its denial, and at the hearing, Kost explained how his difficult health condition resulted in him exhausting his sick leave. Tr. at p. 58. Of note, based on the documentary record and the demeanor of the witnesses, it was clear Kost did not knowingly violate any rule and Warden Heinricy acted in subjective, good-faith in attempting to apply the facility's policies as he understood them. Moreover, it is also worth noting none of the purportedly similar disciplinary actions the Stated entered into the record dealt with the situation at hand, namely the use of compensatory leave. See, e.g., id., at p. 43 ("[Q.] All right. And would it be fair to say that the examples you went through in State's Exhibit S-12, which was titled 'Like Discipline,' none of them involved any compensatory time; is that correct? [A.] That is correct.").

In his closing brief, Kost appears to have returned to his original claim that there was no just cause for his separation. Relying on the seven factors often considered when determining just cause for discipline, Kost argues: he had no notice that compensatory time could not be used for sick time unlike for vacation time; it is unreasonable to have a rule creating a *per se* bar against using compensatory time for sick time; the investigation failed to adequately consider this issue; there is no proof any other employee has ever been disciplined for such action given all the comparable cases DAS submitted failed to deal with compensatory time; and DAS failed to present any evidence Kost had sufficient compensatory time to cover the shortfall in sick leave. See Kost Br. In response, the State argues: DOC's policy is reasonable given the 24/7 staffing and security needs of DOC; Kost had notice of the policy as the Warden testified it has always been this way and as Kost at most said there may have been a rare case of its allowance; the investigation was fair in that Kost was informed of the matter and it revealed all the material and undisputed facts of the case; and the discipline is consistent with others who have been disciplined for not having enough leave for cover a missed shift. DOC Br., at pp. 7-14. DOC the broadly asserts the totality of the circumstances justify the termination. Id., at pp. 15-16.

CONCLUSIONS OF LAW

A.

Under Iowa Code chapter 8A, the Public Employment Relations Board ("PERB") generally "has authority to consider appeals of discharge decisions involving merit system employees." Kuhn v. Pub. Emp. Rels. Bd., No. 07-0096, 2007 WL 4191987, at *1 (Iowa Ct. App. Nov. 29, 2007) (citing Iowa Code § 8A.415(2)). "If the PERB finds the disciplinary action discriminatory or for other reasons 'not constituting just cause,' the employee may be reinstated without loss of pay or benefits for the elapsed period, or the PERB may provide other appropriate remedies." Walsh v. Wahlert, 913 N.W.2d 517, 522 (Iowa 2018) (some internal quotation marks omitted) (citing Iowa Code § 8A.415(2)). While "[t]here is not an all-encompassing definition of just cause," PERB has promulgated rules to guide this "fact-specific" determination. Krogman v. Iowa Pub. Emp. Rels. Bd., No. 22-0043, 2023 WL 1812835, at *4 (Iowa Ct. App. Feb. 8, 2023).

Under the governing PERB administrative rules, for disciplinary action to be proper, just cause must be based on one or more of the following:

> inefficiency, insubordination, less than competent job performance, refusal of a reassignment, failure to perform assigned duties, inadequacy in the performance of assigned duties, dishonesty, improper use of leave, unrehabilitated substance abuse, negligence, conduct which adversely affects the employee's job performance or the agency of employment, conviction of a crime involving moral turpitude, conduct unbecoming a public employee, misconduct, or any other just cause.

11 Iowa Administrative Code ("I.A.C.") § 60.2. In making the just cause determination, a totality of the circumstances must be consider, with relevant factors including, but not limited to:

> whether the employee has been given forewarning or has knowledge of the employer's rules and expected conduct; whether a sufficient and fair investigation was conducted by the employer; whether reasons for the discipline were adequately communicated to the employee; whether there is sufficient proof of the employee's guilt of the offense; whether progressive discipline was followed, or is not applicable under the circumstances; whether the punishment imposed is proportionate to the offense; whether the employee's employment record, including years of service, performance, and disciplinary record, have been given due consideration; and whether there are other mitigating circumstances which would justify a lesser penalty.

Gleiser and State (Dep'tofTransp.), 2009-MA-01, at pp. 16-17. This generally includes the reasonableness of any rule that is being enforced, as well as how similar situated employees have been treated in the past. See, e.g., Kuhn and State of Iowa (Comm'n of Veterans Affairs), 04-MA-04 at 42. No "mechanical, inflexible application of fixed elements" exists when making the just cause determination, and the State bears the burden of proof. Garduno and State (Iowa Workforce Development), 20-PERB-102249, a pp. 9-10. Further, the presence or absence of just cause rests on the reasons stated in the disciplinary letter. See ,e.g., Eaves & State of Iowa (Dep't of Corr.), 03-MA15 04, at p. 14; Hunsaker & State of Iowa (Dep't ofEm p't Servs.), 90-MA-13 at p. 46, n. 27.

B.

In this case, the balance of the record made at the hearing indicates the State did not carry its burden of proof to show just cause existed for the disciplinary action under review. As discussed below, while concern exists about the purported policy prohibiting using compensatory leave for sick leave, Kost did not have notice of the alleged policy at the time of his leave on December 19, 2021 and his subsequent request to use his available compensatory time for a portion of the leave. Because Kost did not have notice of the policy and because using compensatory leave for sick leave is not intrinsically improper (much as an act of moral turpitude would be and requires no separate notice for discipline to occur), no just cause has been established.

As an initial matter, this case fundamentally turns on whether the rule allowing compensatory time for vacation but not sick time outside of the FMLA context existed and was reasonable and whether Kost had notice of such when the leave of absence occurred. This is first because the parties agree Kost was a state employee covered by the merit system at the time of the separation and his separation via discipline can only be sustained if there is just cause. This is also because the parties agree or the record is uniform that Kost has previously been disciplined for unauthorized absences due to lack of leave (stemming from his declining health particularly since Covid) in accord with the progressive disciplinary policy that would require separation for any further incidents.

If the policy against using compensatory time for sick leave was proper and Kost had notice when he indisputably called in sick without sufficient sick time, then the State would carry its burden of proof that just cause existed. Indeed, while there is empathy for Kost and those in his situation of declining health, an employee outside of a protected leave status like FMLA is not entitled to fail on multiple occasions to appear for scheduled work shifts. None of the factors identified by PERB in the just cause analysis or the broader totality of the circumstances of Kost's case can change this, as: there was a sufficient investigation that revealed the undisputed facts of Kost's circumstances; the separation is proportional given the prior discipline that followed the progressive discipline policy; the reason for the separation was communicated; and others have been disciplined for taking time off without sufficient leave. Even Kost's employment history with DOC cannot alter the outcome in part because the need of an employer to have an enforceable leave policy to ensure staffing has overriding weight at least in demanding settings like DOC. Similar to staffing at a hospital or a fire station, employers in demanding settings must find a way to provide service irrespective of the situation at hand.

Here, however, the State has failed to prove DOC actually had a cognizable policy against utilizing accrued compensatory leave for sick time. First, the State failed to present any evidence of a *published* policy concerning the appropriate uses of compensatory leave. There is, for example, no section from the employee handbook stating a correctional officer can use compensatory leave for vacation, must use it for any shortfall in alternative leave when in a protected status like FMLA, and *cannot* use it for sick time. It may exist as all agree correctional officers like Kost can accrue compensatory leave and use it. The State, though, did not present such, and the Tribunal must make its decision based *solely* on the record made. The policy the State did submit said employees must have "applicable leave hours equal to or greater than an absence," but the policy fails to define what constitutes "applicable leave." Ex. S-8, at p. 3. The sick leave section does not state it is the exclusive form of leave for sick time, and the State did not present the vacation policy to show there is somehow a structural difference in the language that would provide fair notice to an employee compensatory time could be used for vacation time (as all agree was appropriate) but not sick time outside the FMLA context. It is just lacking.

Second, the State failed to present sufficient evidence of general, *unpublished* policy concerning the use of compensatory leave for sick leave. While the Warden did testified he understood there was an inflexible prohibition against using compensatory time for sick leave throughout DOC that gave him no discretion but to deny Kost's request to use compensatory time, the Warden could not cite the source of such a policy, stating he just knew it was the rule. Tr., at p. 43. This position is problematic because, as the State's legal counsel noted in the hearing, the Warden did *in fact* have discretion when considering Kost's request, which in accord with the background DAS rules on compensatory leave that generally requires its use to be granted unless granting it would case an "undue disruption." 11 I.A.C. § 63.7. In fact, the State confirmed the Warden had discretion to allow compensatory time for sick time in Kost's case in its closing brief, stating in part DAS rule 63.3(12) "allows discretion." State Closing Br, at p. 9. Rule 63.3(12) states: "If an absence because of illness, injury or other proper reason for using sick leave provided for in this rule extends beyond the employee's accrued sick leave, the appointing authority may require or permit additional time off to be charged to any other accrued leave." 11 I.A.C. § 63.3(12).

As a consequence, based *solely* on the record made at the hearing, it appears the Warden may have had a misunderstanding about the contours of any unpublished policy concerning the use of compensatory time and whether he was required to make a specific determination as to undue disruption or was forced to summarily deny all requests. The failure of the State to provide a comparable case to Kost does little to establish there was a coherent, unwritten policy on the subject, and frankly, it gives some credibility to Kost's offhanded claim he thought he heard of it being allowed now and then. In short, while there may

be an unpublished policy in DOC on the use of compensatory time for sick time that is consistent with DAS rules 63.3 and 63.7 (or at least explains how such rules do not apply), the State failed to present sufficient evidence of it. What was presented was the Warden stating he had no discretion on a request the State acknowledges he did, which indicates the disciplinary action under review was irrational as an abuse of discretion. See, e.g., Stephenson v. Furnas Elec. Co., 522 N.W.2d 828, 831 (Iowa 1994) ("Abuse of discretion is synonymous with unreasonableness, and involves lack of rationality[.]"). Indeed, the failure to recognize discretion exists and exercise it when making a decision is the illustrative example in law of when an abuse of discretion has occurred. See, e.g., Litterer v. Judge, 644 N.W.2d 357, 362 (Iowa 2002) ("Courts do not invade the discretion of the agency by examining the legal authority to act, and an agency that has authority to act but fails to exercise that authority based upon a false belief that there is no such authority abuses its discretion.").

While the Tribunal is unsure how the State could prove just cause when it failed to prove that the underlying action at issue was even rational, it is sufficient for purposes of this proceeding to find Kost did not have any notice of the alleged, unpublished policy prohibiting the use of compensatory leave for sick time in his circumstances. Kost credibly testified he received no training on the issue, and the State did not present any contrary evidence, such as any training material or a witness that knew the source and contours of the claimed rule as well how such was shared with employees. Because using compensatory time for sick time is reasonable at least in the context of an employer who allows compensatory time to be used for other forms of leave and failed to provide any manual or instruction to the contrary, it was within the range of reasonable for Kost to rely on and attempt to use his compensatory leave to cover the 8 minute short fall in time he had in sick leave when he called in sick on December 19, 2021.

The State argues to the contrary, but its claims are unpersuasive. The State first argues Kost had constructive notice that compensatory time would not be allowed to be used for sick time because the underlying DAS rules on sick time only provide that agencies can allow such, but do not have to, relying on Rule 63.12(3). State Closing Br., at p. 9. However, as noted above, Rule 63.12 provides discretion to agencies like DOC to allow other types of leaves to be used for sick time by using of the discretionary term "may," which provides little notice the Warden would be applying an inflexible prohibition again such. Once more, the State fails to even cite let alone explain why DAS's specific rule on compensatory leave—which requires granting of compensatory leave unless there is a finding of "undue disruption"—does not apply or would not seemingly provide notice requests like Kost's should typically be granted. 11 I.A.C. § 63.7. While there may be an ability of DOC to make an agency-wide determination of undue hardship for using compensatory leave for sick time at least for correctional officers like Kost, such a determination would appear to require some form of notice to employees that never occurred here. The State second argues the employee manual provided notice compensatory time could not be used for sick time, but as explained above, it does not. State Closing Br., at p. 9. In fact, the State's position the Warden had discretion to deny or approve Kost's request to use compensatory leave is not consistent with any claim that the employee manual and DAS rules provided notice such requests would be summarily denied.

At most, synthesizing the States claims, the State is arguing Kost never had a reasonable basis to believe his request to use compensatory leave would be granted because: DOC never informed him such a request would be granted; he knew such instances were at best rare by his own testimony; he did not rely on any compensatory time policy as he thought he had sufficient sick time when he called in sick on December 19, 2021; and he was aware he was disciplined in the past for failing to have sufficient leave. State's Closing Br, at pp. 7-11. While some substance exists to the State's broad claims, it is not sufficient with the record made at the hearing. First, the fact Kost was disciplined in the past for failing to have sufficient leave does not materially bear on this case because the State did not show the prior disciplines

involved the attempted use of compensatory time for sick time, which was denied. Without such, the prior disciplines did not provide notice on the dispositive issue in this case. Second, the fact Kost thought he had sufficient sick time when he called in on December 19, 2021, is of little consequence because he did have sufficient compensatory time and because the issue is whether he had notice he could not rely on his other available leave time. Third, the fact Kost at most knew of other rare circumstances of compensatory time being used for sick time is of little help to the State since it was not shown he was aware of any rule denying such requests and because the situation of an individual having insufficient sick time yet having sufficient compensatory leave time would appear to be less common or even allowed in some cases, which may be why the State could not find a single case like Kost's situation to submit to the Tribunal.

Fourth, the fact Kost was never told he had the right to use compensatory time for any sick time also does change the outcome because neither the law nor the employee manual or any training stated he could not use such time. In fact, as discussed above, the manual in the record is silent on the issue, and he received no training on the matter. The background DAS rules suggest it could be permissible and perhaps should be allowed absent a specific finding of "undue hardship." Again, the fact the State acknowledges the Warden had discretion to approve or deny the use of compensatory time for sick time despite him subjectively believing he had no discretion reveals not only the difficulty showing the underlying action meets the baseline rationality standard for all agency action—as recognized in the judicial review standard for agencies in Iowa Code section 17A.19—but also that there was no notice Kost's request would be denied. Indeed, it would have been fully permissible according to the State for the Warden to have granted Kost's request, and with the facts of this case, this is lethal to showing DOC provided sufficient notice to Kost his request would be denied. As such, and considering that none of the other facts PERB has cited in the just cause analysis or the broader totality of the circumstances of this case can paper over the lack of notice even assuming there was an informal policy against allowing such leave, the finding of just cause below is REVERSED.

ORDER

The State of Iowa, Department of Corrections, shall reinstate Chad Kost to his former position (if the position still exists, and if not, to a substantially equivalent position), with back pay and benefits, less interim earnings; restore his benefits accounts to reflect accumulation he would have received but for the discharge; make appropriate adjustments to her personnel records and take all other actions necessary to restore his to the position he would have been in had no discipline occurred.

The costs of reporting and of the agency-requested transcript in the amount of $466.90 are assessed against the State of Iowa, Department of Corrections, pursuant to Iowa Code section 20.6(6) and PERB rule 621—11.9. A bill of costs will be issued to the State of Iowa in accordance with PERB subrule 621—11.9(3).

The Tribunal retains jurisdiction of this matter to address any remedy-related matters that may arise and to specify the precise terms of the remedy. In order to prevent further delay in the resolution of this matter, a hearing to receive evidence and arguments on the precise terms of the remedy, should the parties fail to reach agreement, will be scheduled and held within 45 days of the date this proposed decision becomes PERB's final action.

IT IS SO ORDERED.

Dated this the 20th day of April, 2023.

Jonathan M. Gallagher
Administrative Law Judge

Filed electronically.
Parties served via eFlex.

NOTICE

The proposed decision and order will become PERB's final agency action on the merits of Burden's appeal pursuant to PERB rule 621—9.1 unless, within 20 days of the date below, a party files a petition for review with the Public Employment Relations Board or the Board determines to review the proposed decision on its own merits.