

STATE OF IOWA  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

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TRACY SMITH, Appellant,	)	
and	)	CASE NO. 102204
STATE OF IOWA (DEPARTMENT OF HUMAN SERVICES), Appellee.	)	

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RULING AND ORDER

On July 18, 2018, Appellant Tracy Smith filed this state employee disciplinary action appeal with the Public Employment Relations Board (PERB) pursuant to Iowa Code subsection 8A.415(2) and PERB subrule 621—11.2(2). Smith appeals a five-day paper suspension with a final warning that she received on March 1, 2018. The Department of Administrative Services (DAS) denied Smith’s grievance at the third step of the grievance procedure and issued a written response upholding the discipline on June 15, 2018.

On August 6, 2018, Appellee State of Iowa filed a pre-answer motion to dismiss Smith’s appeal contending it was not timely filed. Smith resists the motion. Oral arguments on the State’s motion to dismiss were not held.<sup>1</sup>

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<sup>1</sup> Oral arguments were initially ordered to be heard on September 26, 2018. I contacted the parties at the scheduled time but Smith was not available. Having reviewed the record, and in accordance with discretion granted by PERB rule 621—2.10, I determined it was unnecessary to reschedule arguments and that a decision could be rendered on the parties’ written submissions.

### Procedural Background

The pertinent filings in this case consist of: Smith's appeal form; the State's pre-answer motion to dismiss along with a copy of the DAS third step response to Smith's grievance as issued on June 15, 2018; and Smith's resistance to the State's motion to dismiss. These submissions reveal the following undisputed facts.

Smith is employed by the State of Iowa, Department of Human Services (DHS) as a resident treatment worker at the Glenwood Resource Center. On March 1, 2018, Smith received a five-day paper suspension with a final warning for violations of DHS work rules regarding attendance and punctuality. Smith timely appealed her discipline to DAS at step three of the prescribed discipline resolution procedure. By rule, DAS must issue a written response to discipline appeals within thirty calendar days of receipt. It appears Smith's appeal was initially misfiled and the DAS designee requested additional time to respond to the appeal. Smith and DHS agreed to grant an extension beyond the thirty calendar days set by rule.

On June 15, 2018, the DAS director's designee issued a response denying Smith's grievance and upholding the five-day paper suspension. DAS's response informed Smith of her appeal rights if she was not satisfied with the third step response. Referencing DAS subrules 61.2(5) and 61.2(6), DAS's response included

language that an appeal of the DAS response may be filed with PERB within thirty calendar days.

Smith filed her appeal of the DAS response with PERB on July 18, 2018. The State moved to dismiss her appeal on August 6, 2018.

Applicable Law

Iowa Code section 8A.415 and DAS rule 11—61.2 establish the procedures for appealing disciplinary actions and prescribe the applicable appeal deadlines for each step of the appeal process. Those sections provide, in relevant part:

**8A.415. Grievance and discipline resolution procedures.**

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*2. Discipline resolution.*

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

*b.* If not satisfied, the employee may, within thirty calendar days following the director's response, file an appeal with the public employment relations board. ...

**11—61.2(8A) Appeals.**

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**61.2(5)** *Appeal of grievance decisions.* An employee who has alleged a violation of Iowa Code sections 8A.401 to 8A.458 or the rules adopted to implement Iowa Code sections 8A.401 to 8A.458 may, within 30 calendar days after the date the director's response at the third step of the grievance procedure was issued or should have been issued, file an appeal with the public employment relations board. A nontemporary employee covered by merit system provisions who is suspended, reduced in pay within the same pay grade, disciplinarily demoted, or discharged, except during the

employee's period of probationary status, may, if not satisfied with the decision of the director, request an appeal hearing before the public employment relations board within 30 calendar days after the date the director's decision was issued or should have been issued. ... In all other instances, decisions by the public employment relations board constitute final agency action.

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

These provisions uniformly establish that an employee must initiate her appeal with PERB within thirty calendar days from the date DAS issued or should have issued its third step response. PERB has consistently recognized that the 30-day appeal period prescribed by 8A.415(2) is mandatory and jurisdictional. *E.g., Custis and State of Iowa (Dep't of Corr.)*, 92-MA-02, 92-MA-31 at 6 (PERB 1993); *Alleman and State of Iowa (Dep't of Revenue and Fin.)*, 96-MA-10 at 5 (PERB 1996).

*State's Motion to Dismiss*

The State argues Smith's appeal should be dismissed because it was not filed within the required thirty calendar days following issuance of the third step response.

Smith acknowledges she did not file her appeal with PERB within thirty calendar days after DAS issued its response on June 15, 2018. Smith argues, however, that the filing deadline should be waived or extended because her appeal at the third step of the grievance procedure was timely. Additionally, Smith contends her filing deadline should be extended beyond thirty calendar days because she agreed to extend DAS's time to respond at the third step of the grievance procedure beyond the thirty days set by rule.

Discussion

No factual dispute exists regarding the pertinent dates for resolving the timeliness of Smith's appeal. DAS issued its third step response on June 15, 2018. The response was provided to Smith by email that same day. The response informed Smith of her appeal rights and that she had thirty calendar days to exercise those appeal rights by filing to PERB.

In this case, thirty calendar days from the date DAS issued its response on June 15, 2018 is Sunday, July 15, 2018. Iowa Code section 4.1(34) provides that, in computing time, if the last day for commencing an action falls on a Sunday, the deadline for filing is extended to include the entirety of the following Monday. As such, in this instance, Smith's deadline for appealing to PERB was Monday, July 16, 2018. Smith did not file the instant appeal until July 18, 2018, two days after the filing deadline.

Smith's arguments for a waiver or an extension of the filing deadline are without a legal basis. Iowa Code subsection 8A.415(2) and DAS rule 11—61.2, quoted above, prescribe the applicable appeal deadline for each step of the discipline resolution process. The appealing employee is required to meet each prescribed deadline. A timely filing at step three of the grievance procedure with DAS does not excuse an untimely filing with PERB. As such, Smith was required to timely appeal her discipline at each step of the appeal procedure, including her appeal to PERB.

Smith's argument for a reciprocal extension as the one she provided to DAS is similarly unavailing. As DAS rule 61.2 states, DAS is required to issue a written response within thirty calendar days of receiving an appeal at the third step of the grievance procedure. However, the same rule allows DAS to seek an extension from the parties for responding to the appeal. In this case, although Smith was not required to do so, she agreed to grant DAS an extension to respond to her appeal beyond the prescribed thirty days. This voluntary agreement to grant an extension does not, as Smith argues, entitle her to a reciprocal extension of her deadline to initiate an appeal with PERB. Even if Smith had not agreed to an extension and DAS failed to respond within thirty calendar days, Smith had an option under the rules to carry her appeal forward to PERB from the date that the DAS response should have been issued.

The extension Smith agreed to concerns a deadline for responding to a timely filed appeal. Unlike the extension she granted, the extension Smith seeks here is for commencing an appeal to the next step of the discipline resolution procedure. These two situations are legally distinct. The prescribed 30-day deadline for filing an appeal with PERB is mandatory and jurisdictional and a voluntary extension of the filing deadline to commence an appeal is not an option. *Alleman*, 96-MA-10 at 5. As such, unless timely initiated, PERB has no jurisdiction to adjudicate the merits of the appeal. Neither PERB nor the other party can waive or extend the applicable filing deadline as such action would enlarge PERB's jurisdiction. *Id.* at 10-11.

Because Smith did not file her appeal within thirty calendar days following DAS's third step response, PERB lacks jurisdiction to adjudicate the merits of this appeal. Accordingly, I hereby propose entry of the following:

#### ORDER

The State's motion to dismiss is GRANTED and this state employee disciplinary action appeal filed by Tracy Smith is hereby DISMISSED.

DATED at Des Moines, Iowa this 26th day of November, 2018.

/s/ Jasmina Sarajlija  
Administrative Law Judge

Electronically filed.  
Served upon parties via eFlex.