

STATE OF IOWA  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

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SHARON WILKERSON-MOORE,	)	
Appellant,	)	
	)	
and	)	CASE NO. 100788
	)	
STATE OF IOWA (DEPARTMENT OF	)	
HUMAN SERVICES-FISCAL	)	
MANAGEMENT DIVISION),	)	
Appellee.	)	

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DECISION ON REVIEW

This case is before the Public Employment Relations Board (PERB or Board) on Appellee State of Iowa's petition for review of a proposed decision and order issued by an administrative law judge (ALJ) following an evidentiary hearing on Wilkerson-Moore's Iowa Code section 8A.415 disciplinary action appeal. Wilkerson-Moore collected money and accounted for a social activity fund, the Jeans Day fund. Money from the fund was requested from Wilkerson-Moore on an irregular basis to donate to the Food Bank. She was terminated for her alleged misuse of the fund.

In her proposed decision issued December 5, 2017, the ALJ concluded that the State had not established just cause for its termination of Wilkerson-Moore's employment on September 12, 2016. The ALJ found, however, that Wilkerson-Moore's conduct warranted the imposition of a five-day suspension and ordered Wilkerson-Moore's reinstatement to her former position with back pay and restoration of benefits.

Counsel for the parties, Jeffrey Edgar for the State and Christopher Stewart for Wilkerson-Moore, telephonically presented oral arguments to the Board on February 22, 2018. Both parties filed briefs outlining their respective positions prior to oral arguments. Wilkerson-Moore argues progressive discipline principles apply. Wilkerson-Moore agrees with the ALJ's proposed findings of fact and imposition of a five-day suspension. The State does not similarly agree with respect to any findings of fact which are supportive of the ALJ's conclusions and determination that the State did not establish just cause for its termination of Wilkerson-Moore's employment. The State does not agree specifically to the finding that Wilkerson-Moore's collection of money and accounting for the Jeans Day fund were not part of her job functions and were not work related.

Pursuant to Iowa Code section 17A.15(3), on appeal from an ALJ's proposed decision we possess all powers that we would have possessed had we elected, pursuant to PERB rule 621—2.1(20), to preside at the evidentiary hearing in the place of the ALJ. Pursuant to PERB rules 621—11.8(8A,20) and 621—9.5(17A,20), on this petition for review we have utilized the record as submitted to the ALJ.

Based upon our review of this record, as well as the parties' briefs and oral arguments, we adopt the ALJ's findings of fact with additions and we adopt the ALJ's conclusions with additional grounds for the basis of our determination. We conclude the State did not establish just cause existed to support its termination of Wilkerson-Moore's employment, but just

cause existed to support a five-day suspension. However, we modify the ALJ's order for reinstatement to her former position and order reinstatement to a comparable position to a different area. We make the following findings of fact and conclusions of law:

#### FINDINGS OF FACT

The ALJ's findings of fact, as set forth in the proposed decision and order attached as "Appendix A," are fully supported by the record. We adopt the ALJ's factual findings as our own, with the following additions:

The investigatory interview of Wilkerson-Moore on September 9, 2016, reveals the DHS division's lackadaisical approach to the Jeans Day fund and reasons why the fund was difficult for Wilkerson-Moore to maintain. During their interview of Wilkerson-Moore, her supervisor, Slaybaugh, and Bruett went through an informal accounting of the Jeans Day fund. In the course of their discussion Slaybaugh commented, "After July 6<sup>th</sup> – I think you turned money in? Well, we'll get to it, because sometimes people give you money for a previous day that they hadn't paid for." Included in their accounting was an employee who had paid her IOU for \$11. As the ALJ correctly included in her findings, people would give IOUs or hand Wilkerson-Moore money when she was in the middle of other tasks or hand her money when she was not at her desk. People would also say, "Hey, I'll pay you later."

Wilkerson-Moore found it difficult to keep up with the fund for these reasons. Wilkerson-Moore stated at one point in her interview, "And I keep

an envelope – and I’ve been doing it like this every month because it gets too confusing, it has gotten confusing in the past.” Wilkerson-Moore was never given a receipt when she turned over money from the fund.

We agree with the ALJ’s finding that keeping track of donations or charitable contributions was not in Wilkerson-Moore’s job description and was not done in her official capacity as a confidential secretary. Although the State continues to assert that Wilkerson-Moore’s collection of money and accounting for the Jeans Day fund were work related, the State’s witnesses testified that the fund was a social and voluntary activity. The State’s witness, Jody Lane-Molnari, described the division’s employees who did Food Bank activities as “an unofficial social committee,” of which she and Wilkerson-Moore were members. Their supervisor, Slaybaugh, testified that her own Food Bank activities were voluntary and not part of part of her job functions as CFO.

The Jeans Day fund is one of several social activities which the “unofficial social committee” undertook. We are not persuaded that the fund and related activities in maintaining the fund were work related for Wilkerson-Moore. The fact that Wilkerson-Moore’s supervisor, Slaybaugh, asked her to collect money for the Jeans Day fund and Wilkerson-Moore did it on work time does not change the character or nature of the underlying activity any more than the fact that employees contributed to the fund for occasions when they wore jeans during working hours. Characterizing social activities as work related for these reasons would be

a slippery slope for the State and all of its departments. Wilkerson-Moore's collection of money and accounting of the Jeans Day fund were voluntary activities for an informal social fund; these activities were not part of her job functions and were not work related.

Slaybaugh and Bruett conducted only one investigatory interview of Wilkerson-Moore on September 9, 2016. When they met with her on September 12, they had completed the investigation and considered their meeting with her a "Loudermill Investigatory Interview" as stated to her in Bruett's opening comments. He also stated, "Sharon at this time we have completed the investigation into misconduct of misuse of Food Bank funds for personal use. It has been determined that you violated the following work rules. I will give you a copy of them to read." Sharon was not told the amount at issue or whether other employees had confirmed or denied receipt of Jeans Day money from her. Bruett had replied in part, "I don't know if other people had or not [collected money from Wilkerson-Moore]."

The letter of termination provided in relevant part:

This letter is to inform you that, effective today, September 12, 2016, you are being discharged from employment as an exempt confidential Secretary 2 with the Department of Human Services. This action is being taken as a result of our investigation. *Specifically, that you acknowledged on multiple occasions that you misused employee donated Food Bank funds for personal use.* Our investigation brought forth evidence that supports the Department's allegation. Your actions are in violation of the following Department and State work rules ... :

(Emphasis added). (See App. at 10 for work rules cited). When Slaybaugh was asked why she believed Wilkerson-Moore's misuse of the fund violated

the rules, she testified in part, “Well, because it’s unethical behavior.” Wilkerson-Moore was not terminated for performance issues. Her collection and accounting of money during the course of performing her work-related duties have never been an issue.

## CONCLUSIONS OF LAW

We have carefully considered the State’s arguments in our review of the ALJ’s conclusions. The ALJ correctly examined the totality of circumstances to reach her determination that the State did not establish just cause existed to support its termination of Wilkerson-Moore’s employment. Except as noted below, we agree with the ALJ’s conclusions as set out in the Appendix and adopt them as our own, with the following additional discussion:

The Board agrees with the ALJ’s conclusion that the investigatory interview process could have been more extensive. There are too many unanswered questions regarding: the Jeans Day fund practices and those of other Food Bank activities; Wilkerson-Moore’s role and responsibilities for payment on behalf of other people who owed the fund; and Slaybaugh’s knowledge of lax payments and accounting for the Jeans Day fund.

In addition to its insufficiency, the investigation was not fair to the extent that it was conducted by persons who had been involved, directly or indirectly, in the Jeans Day fund rather than disinterested third-parties who did not have a vested interest in the outcome of the investigation. This does not diminish the significance of Wilkerson-Moore’s admission to

her misuse of the fund. Nonetheless, the investigation focused on her fault alone and did not account for the entirety of the situation—from the IOUs to random collections of the fund from Wilkerson-Moore to the lack of accounting in many respects. One employee owed the fund almost twice as much as the \$6 Wilkerson-Moore was terminated for misusing. An objective investigation by disinterested parties may have revealed what we identify as a mere unofficial social fund that was approached in a lackadaisical manner by everyone involved.

Finally, we agree with the ALJ that the State did not establish just cause for the termination. We reach our determination based on our analysis of the stated reason for Wilkerson-Moore's termination, her misuse of the fund, and our consideration of the totality of circumstances.

The stated reason for her termination was not theft or a determination that Wilkerson-Moore engaged in illegal activity as the State now argues. As required by Iowa Code section 8A.413(8), DAS rules provide that employees disciplinarily suspended, demoted, reduced in pay or discharged be provided with a written statement of the reasons for the action. We have long held that the presence or absence of just cause must be determined upon the stated reasons alone. *See, e.g., Eaves and State (Dep't of Corrections)*, 03-MA-04 at 14.

The excerpt from the termination letter sets forth the reason for the disciplinary action—Wilkerson-Moore's admission to her misuse of the Jeans Day fund. The investigation was completed and the decision to take

disciplinary action was made based on her admission. We make no determinations as to whether her actions constituted theft and what disciplinary action may be appropriate in cases of theft. We decline to engage in an analysis of the possible illegality of her actions and an after-the-fact characterization of her actions in a criminal context.

The investigation was inadequate; there was not sufficient proof that she did anything other than record the social fund collections with an intent to remit payment for the recorded amount when requested; the stated reason for the disciplinary action was her misuse of the fund; the sufficient proof that she misused the fund was her admission; and her supervisor, Slaybaugh, considered her misuse of the social fund as unethical behavior in violation of work rules.

Based on the above-reasons, we conclude that there was sufficient proof that Wilkerson-Moore misused money from an unofficial social fund that was administered, paid, and collected in a haphazard fashion by Wilkerson-Moore and others. We agree with the ALJ's other conclusions in her consideration of all the circumstances. Termination was excessive when taking into consideration: principles of progressive discipline, the appropriate penalty for her misuse of the fund, her long-term employment record with no disciplinary action and other mitigating factors. The State did not establish that just cause existed to support the termination of Wilkerson-Moore's employment.

While we are skeptical of the imposition of a five-day suspension for Wilkerson-Moore and would scrutinize the severity in similar cases, we agree with the ALJ that there is just cause to support its imposition in this particular case. In fashioning the remainder of an appropriate remedy, we modify the ALJ's order for the State to reinstate Wilkerson-Moore to her former position as confidential secretary. We are mindful of the State's assertion that trust has been breached between Slaybaugh and Wilkerson-Moore, but we disagree as to how and for whom that trust has been breached. For this reason, it is a more appropriate remedy to place Wilkerson-Moore in a comparable position in a different area.

The Board has fully considered all of the State's other arguments on appeal. None have persuaded us to reach conclusions different than those reached by the ALJ. Accordingly, we enter the following:

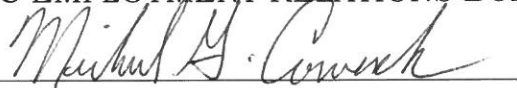
#### ORDER

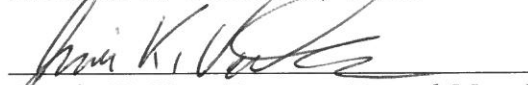
The Department of Human Services shall reinstate Sharon Wilkerson-Moore to a substantially equivalent position as confidential secretary in the Department of Human Services, with back pay and benefits, less interim earnings; restore her benefit accounts to reflect accumulations she would have received but for her discharge; make appropriate adjustments to her personnel records; and take all other actions necessary to restore her to the position she would have been in had she not been discharged, but had instead received an unpaid five-day suspension.


The Board retains jurisdiction of this matter in order to address any remedy-related matters which might hereafter arise and to specify the precise terms of the remedy. In order to prevent further delay in the resolution of this matter, in the event the parties fail to reach agreement, the Board will schedule a hearing to receive evidence and arguments on the precise terms of the remedy, within 45 days of the below date. Agency action will not be final until the appropriate remedy is approved or determined by the Board. The Board retains jurisdiction to enter whatever orders may be necessary or appropriate to address any remedy-related matters which may hereafter arise.

DATED at Des Moines, Iowa, this 14th day of March, 2018.

PUBLIC EMPLOYMENT RELATIONS BOARD

  
Michael G. Cormack, Chair

  
Jamie K. Van Fossen, Board Member

  
Mary T. Gannon, Board Member

eFiled.

STATE OF IOWA  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARDSHARON WILKERSON-MOORE,  
Appellant,

and

STATE OF IOWA (DEPARTMENT OF  
HUMAN SERVICES-FISCAL  
MANAGEMENT DIVISION),  
Appellee.

CASE NO. 100788

PROPOSED DECISION  
AND ORDER

Appellant, Sharon Wilkerson-Moore filed this state employee disciplinary appeal with the Public Employment Relations Board ("PERB") pursuant to Iowa Code section 8A.415(2)(b) following a third-step response by the director of the Iowa Department of Administrative Services (DAS) denying her challenge of a disciplinary action. Wilkerson-Moore was employed by the State of Iowa as a confidential secretary in the Fiscal Management Division ("Division") of the Department of Human Services ("DHS" or "Department"). Wilkerson-Moore alleges the State did not have just cause to terminate her employment on September 12, 2016. The State contends just cause supports the termination.

An open, evidentiary hearing was held on April 18, 2017. Christopher Stewart represented Wilkerson-Moore. Tamara Knight and Kathryn Greenfield represented the State. The parties submitted post-hearing briefs on May 19, 2017. After considering the evidence and the arguments of the parties, I find the following:

## FINDINGS OF FACT

The Department of Human Services provides programs and services to support health in the state of Iowa. DHS also provides economic security programs for citizens in the State. The DHS budget is one of the largest in state government. The Fiscal Management Division of DHS has a responsibility to the State, the legislature, and taxpayers to manage DHS's funds appropriately.

Wilkerson-Moore has worked with the State since June 1994. She was hired in the position of Secretary 2 and was later reclassified as Legal Secretary 3. The State laid off Wilkerson-Moore in May 2006 for budgetary reasons. The State rehired Wilkerson-Moore in November 2006 in DHS's Child Support Recovery Unit. She was transferred to DHS's Fiscal Management Division in January 2010 as Secretary 2, and served as the confidential secretary for the division's chief financial officer. In that position, Wilkerson-Moore set meetings, filed e-mails, made reservations, ordered supplies, did payroll, accepted cash receipts, and provided receipts for various DHS programs. Jean Slaybaugh was the chief financial officer and Wilkerson-Moore's supervisor for the majority of Wilkerson-Moore's tenure in the Fiscal Management Division.

The record demonstrates that during her employment at DHS, Wilkerson-Moore received positive evaluations. Wilkerson-Moore met or exceeded tasks and had an overall rating of meeting expectations. Slaybaugh characterized Wilkerson-Moore as "a reasonably good

employee.” Wilkerson-Moore had no prior discipline in her twenty plus years with the State. The State did not present any evidence that Wilkerson-Moore had any problems with accounting, collecting, or totaling of monies in her role as a confidential secretary. Wilkerson-Moore acknowledged that she had received the State of Iowa Employee Handbook both on December 30, 2014, and July 1, 2015. Wilkerson-Moore also acknowledged that she had received the DHS Employee Handbook on December 30, 2014.

Wilkerson-Moore helped organize social events in the Fiscal Management Division. These activities ranged from events for birthdays and holidays to charitable events held to raise funds for the Food Bank of Iowa (“Food Bank”). DHS has held competitions for five or six years that pits division against division to raise money throughout the year for the Food Bank. The competitions culminate in October in a department-wide event called cupcake wars where the divisions decorate cupcakes. To raise money for the Food Bank, the Fiscal Management Division has held soup lunches and walking taco lunches. The Division also organized “Jeans Days” where an employee was allowed to wear jeans on a specified day if they paid a dollar which was donated to the Food Bank.

Wilkerson-Moore, her supervisor, Slaybaugh, and her coworker Jody Lane-Molnari were involved in organizing these events. It is unclear who came up with the idea of Jeans Day, but Slaybaugh directed Wilkerson-Moore to send out a memo about the Jeans Day fundraiser.

Slaybaugh also assigned Wilkerson-Moore with the task of collecting the Jeans Day money, but did not provide Wilkerson-Moore with instructions or guidance on how to provide an accounting for the money that she was collecting. Keeping track of donations or charitable contributions was not in Wilkerson-Moore's job description and was not done in her official capacity as a confidential secretary.

The first collection for Jeans Day took place in August 2015. Wilkerson-Moore collected the money from August 2015 through some time in August 2016. As Wilkerson-Moore collected the money she recorded the date of the Jeans Day and the name of the person from whom she collected money on a manila envelope. She kept the money in the envelope. Wilkerson-Moore found it difficult to keep up with the Jeans Day money because people would randomly stop by her desk to drop off money when she was in the middle of other tasks, or would hand her money when she was not at her desk. People also would do IOUs rather than paying the money on the Jeans Day. The moneys that Wilkerson-Moore collected were not considered State money, but solely came from fellow employees that were contributing money to the Food Bank for the privilege of wearing jeans on the designated jeans day. Wilkerson-Moore was never given a specific date or time that the money would be collected from her to give to the Food Bank. She was also not told who would collect the money from her.

From August 2015 through October 9, 2015, the division raised \$62 through the Jeans Day fundraiser. No one disputes that there was a full accounting of the money for this period of time although it is unclear who collected the money from Wilkerson-Moore.

From October 9, 2015, through July 2016, the evidence does not clearly demonstrate how much money was raised through the Jeans Day fundraiser, at what point that money got picked up from Wilkerson-Moore, or who picked that money up from Wilkerson-Moore. In an e-mail from Wilkerson-Moore to Lane-Molnari on June 10, 2016, Wilkerson-Moore says that after August 2015, the division raised \$137. This figure included the \$62 that was picked up from Wilkerson-Moore in October 2015.

On July 8, 2016, Ron Bruett picked up \$56 of Jeans Day money from Wilkerson-Moore. Although in the e-mail Wilkerson-Moore stated the division raised \$137, only \$118 is accounted for by the money picked up from Wilkerson-Moore in October 2015 and July 2016. It is unclear whether anyone picked up any money from Wilkerson-Moore between October 2015 and July 2016 since there was no consistency in when or who would pick up the money. No one raised the issue of this potential discrepancy prior to September 2016 and the individuals picking up money from Wilkerson-Moore did not question the accounting at the time. However, during Wilkerson-Moore's investigative interviews in September, Bruett questioned Wilkerson-Moore's accounting of the

donated Food Bank funds that were collected between October 2015 and July 2016. The State now seemingly contends there may have been money missing in some of those envelopes.<sup>1</sup>

After July 2016 the division raised \$7 from the Jeans Day fundraiser according to Wilkerson-Moore's records. Only \$1 of this money raised was collected from Wilkerson-Moore in September 2016. There was \$6 missing from the envelopes collected from Wilkerson-Moore in September. This is the only money the State demonstrated was clearly missing from the Jeans Bank donated-funds.

In August 2016, roughly one year after the Jeans Day fundraiser began, the DHS divisions were planning "Cupcake Wars," the culmination of the Food Bank donation competition. Wilkerson-Moore's coworker, Lane-Molnari, was in charge of this event from the Fiscal Management Division. In planning for this event, Lane-Molnari needed to know the amount the Division had raised so far. Lane-Molnari went to Wilkerson-Moore's desk and asked Wilkerson-Moore about the Jeans Day money that had been collected. Wilkerson-Moore told Lane-Molnari that Ron Bruett had collected the Jeans Day money from her in July. Lane-Molnari knew there had been a few Jeans Days after that last collection so she asked about the moneys that Wilkerson-Moore had collected but had not yet turned in to be donated to the Food Bank.

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<sup>1</sup> The photocopies of the envelopes upon which Wilkerson-Moore accounted for the Jeans Day money are admitted as State exhibits, but the writing on the envelopes is not legible on the photocopies.

When asked for the accounting, Wilkerson-Moore either reached for her purse as if to get the money or told Lane-Molnari she would have to get the money from her purse. Either way it was clear to Lane-Molnari that Wilkerson-Moore needed to get money from her own billfold to get the money that should have been in the Jeans Day manila envelope.

Lane-Molnari was concerned about the interaction and relayed the incident to Slaybaugh, who was both Lane-Molnari and Wilkerson-Moore's supervisor. After hearing about this incident, Slaybaugh and Ron Bruett, from human resources, discussed the matter with personnel officer Eric Lynes and Jeff Edgar with the Department of Administrative Services. Then Slaybaugh and Bruett began to investigate by conducting interviews of both Wilkerson-Moore and Lane-Molnari.

Slaybaugh and Bruett interviewed Wilkerson-Moore on September 9 and again on September 12, 2016. They interviewed Lane-Molnari on September 7 and twice on September 9. Wilkerson-Moore was suspended on September 9, 2016, pending the completion of the investigation.

When interviewing Wilkerson-Moore on September 9, Bruett and Slaybaugh asked for the records on the Jeans Day collection. Wilkerson-Moore retrieved the envelope of money that had not been collected, and it showed that seven people had donated, but the envelope only had \$1 in it. Wilkerson-Moore admitted that she "borrowed" the money, but stated that she would give it right back. During her multiple interviews with Bruett and Slaybaugh, Wilkerson-Moore admitted that she had taken

money out of the Jeans Day collection in the past because, “sometimes you need some cash.” She stated that she knew she “shouldn’t touch it.” Wilkerson-Moore believed she had time to put the money back in the envelope before the money was given to the Food Bank and stated that she kept documentation of what she took. She apologized if there was any discrepancy between what she took and what she had repaid. Wilkerson-Moore admitted multiple times in the investigation that she took and misused Food Bank funds without permission. However, Wilkerson-Moore was never accused of taking any State money.

Bruett and Slaybaugh also asked Wilkerson-Moore about the discrepancy in the amount raised between October 2015 and June 2016. In an e-mail to Lane-Molinari, Wilkerson-Moore stated that since August 2015, the amount collected for the Jeans Day fundraiser was \$137. However, someone picked up \$62 from Wilkerson-Moore in October and Bruett picked up \$56 in July totaling only \$118. When asked about the discrepancy, Wilkerson-Moore said she is not sure the \$137 was accurate, and she believed that Lane-Molinari may have picked up some of the money and commingled it with other Food Bank donations from other fundraisers. In a follow-up interview, Lane-Molinari denied picking up any of the Jeans Day money from Wilkerson-Moore. It is unclear based on the evidence presented whether there is money missing from the moneys collected between October 2015 and July 2016.

On the morning of September 12, Wilkerson-Moore e-mailed Bruett stating that she had borrowed money from the Food Bank donations and that she may have lost track of some of the money that she had borrowed, but never took the money maliciously.

I find Wilkerson-Moore's claim that she intended to repay the money credible. Wilkerson-Moore stated multiple times during her interviews and in the e-mail to Bruett that she intended to repay the money. The fact that she recorded the money that she had collected bolsters that claim. If she intended to steal the money and keep it for her own use, she likely would not record the money she had collected. Wilkerson-Moore did not deny taking the money, which also strengthens her claim that she intended to repay the money. Additionally, after viewing Wilkerson-Moore's demeanor during her testimony, I find that she did not take the money with the intent to steal, but with the intent to repay the money.

In the e-mail to Bruett, Wilkerson-Moore emphasized that she believed the investigation should have been handled differently considering her lack of a disciplinary record and her dedication. Wilkerson-Moore forwarded this e-mail to Slaybaugh. Bruett and Slaybaugh called Wilkerson-Moore in for further interviews in the afternoon of September 12.

At the September 12 interview, Bruett provided Wilkerson-Moore with the handbook provisions DHS claims she violated and gave her a

chance to ask questions and discuss any other information prior to DHS's determination of discipline.

On September 12, 2016, Slaybaugh terminated Wilkerson-Moore's employment for the violation of two DHS work rules. The termination letter states that Wilkerson-Moore's misuse of employee donated funds for personal use on multiple occasions was a violation of the following rules:

DHS Employee Handbook  
Section A-2. Code of Conduct

Employees are expected to conduct themselves in a manner that creates and maintains respect for the DHS, their co-workers and the individuals served. Employees are expected to maintain high standards of behavior in both their personal and official activities. The Department prohibits any unethical or illegal conduct by an employee on or off duty that affects or has the potential to affect the Department. Employees have a duty to report unethical or illegal activity, relating to state employment, to their Supervisor, Appointing Authority or Department Director.

Part D.

Employee Responsibilities and Work Rules

Section D-1. General Standards of Conduct and Work Rules

8. Employees shall not engage in illegal or disorderly conduct including, but not limited to, roughhousing, pushing, throwing objects, immoral or indecent conduct, or participate in any activity, misconduct or behavior in the workplace and/or while on duty, which may have a negative effect on the Department's reputation and/or community standing.

State of Iowa Employee Handbook  
Disciplinary Actions

...Disciplinary action, up to and including discharge, may be based on, but not limited to, any of the following reasons: inefficiency, insubordination, less-than-competent job performance, unauthorized use or

abuse of state property, failure to perform assigned duties, inadequacy in the performance of assigned duties, inattentiveness to duty, dishonesty, theft, improper use of leave, substance abuse, negligence, conduct which adversely affects the employee's job performance or the department, conduct unbecoming a public employee, misconduct, or any other just cause . . .

As a confidential secretary, Wilkerson-Moore had access to confidential information and Slaybaugh needed to have a high level of trust in the person in that position. Due to the misuse of Food Bank funds, Slaybaugh believed that trust was "irreparably damaged." This led to Slaybaugh's decision to terminate Wilkerson-Moore's employment.

Wilkerson-Moore filed her non-contract grievance form on September 15, 2016, claiming she was discharged without just cause and requesting reinstatement, removal of discipline from her file, back pay and benefits, and to be made whole.

Following the third-step grievance meeting, the DAS director's designee denied Wilkerson-Moore's grievance on December 2, 2016, concluding that termination was warranted and supported by just cause.

Wilkerson-Moore filed the present appeal December 6, 2016.

#### CONCLUSIONS OF LAW

Wilkerson-Moore filed this appeal pursuant to Iowa Code section 8A.415(2), which states:

##### 2. Discipline Resolution

a. A merit system employee . . . 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 . . . If the public employment relations board finds that the action taken by the appointing authority was for political, religious, racial, national origin, sex, age, or other reasons not constituting just cause, the employee may be reinstated without loss of pay or benefits for the elapsed period, or the public employment relations board may provide other appropriate remedies.

DAS rules provide specific discipline measures and procedures for disciplining employees.

11—60.2(8A) Disciplinary actions. Except as otherwise provided, in addition to less severe progressive discipline measures, any employee is subject to any of the following disciplinary actions when the action is based on a standard of just cause: suspension, reduction of pay within the same pay grade, disciplinary demotion, or discharge . . . . Disciplinary action shall be based on any of the following reasons: 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 of the agency of employment, conviction of a crime involving moral turpitude, conduct unbecoming a public employee, misconduct, or any other just cause.

. . . .

60.2(4) Discharge. An appointing authority may discharge an employee. Prior to the employee's being discharged, the appointing authority shall inform the employee during a face-to-face meeting of the impending discharge and the reasons for the discharge, and at that time the employee shall have the opportunity to respond. A written statement of

the reasons for the discharge shall be sent to the employee within 24 hours after the effective date of the discharge, and a copy shall be sent to the director by the appointing authority at the same time.

The State bears the burden of establishing that just cause supports the discipline imposed. *Phillips and State of Iowa (Department of Human Resources)*, 12-MA-05 at App. 11. The term “just cause” when used in section 8A.415(2) and in administrative rule is undefined. *Stockbridge and State of Iowa (Department of Corrections)*, 06-MA-06 at 21. Determination of whether management has just cause to discipline an employee requires case-by-case analysis. *Id.* at 20.

When determining the existence of just cause, PERB examines the totality of the circumstances. *See, e.g., Cooper and State of Iowa (Department of Human Rights)*, 97-MA-12 at 29. The Board has stated that the just cause determination “requires an analysis of all the relevant circumstances concerning the conduct which precipitated the disciplinary action, and need not depend upon a mechanical, inflexible application of fixed ‘elements’ which may or may not have any real applicability to the case under consideration.” *Hunsaker and State of Iowa (Department of Employment Services)*, 90-MA-13 at 40. Although just cause requires examination on a case-by-case basis to determine just cause, the Board has declared that the following factors may be relevant to the just cause determination:

While there is no fixed test to be applied, examples of some of the types of factors which may be relevant to a just cause determination, depending on the circumstances,

include, but are 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 sufficient evidence or proof of the employee's guilt of the offense is established; whether progressive discipline was followed, or 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.

*Hoffman and State of Iowa (Department of Transportation)*, 93-MA-21 at 22. The Board has also considered how other similarly situated employees have been treated. *Kuhn and State of Iowa (Commission of Veterans Affairs)*, 04-MA-04 at 42.

PERB has determined the presence or absence of just cause rests on the reasons stated in the disciplinary letter. *Eaves and State of Iowa (Department of Corrections)*, 03-MA-04 at 14. Iowa Code section 8A.413(18)(b) and DAS rule require the State to provide the employee being disciplined with a written statement of the reasons for the discipline. See, e.g., *Hunsaker and State of Iowa (Department of Employment Services)*, 90-MA-13 at 46, n.27.

*Sufficient Evidence of Proof of Employee's Guilt*

In order to establish just cause, the State must demonstrate the employee is guilty of violating the work rule, policy, or agreement cited in the termination letter. *Gleiser and State of Iowa (Dep't of Transp.)*, 09-MA-01 at 17-18, 21. In this case, the State cited Wilkerson-Moore's

misuse of the employee-donated Food Bank funds for personal use as the reason for her discharge. In the notice of discharge, the State claimed Wilkerson-Moore's conduct violated the DHS Employee Handbook, which requires employees to maintain high standards of behavior and "prohibits any unethical or illegal conduct by an employee on or off duty that affects or has the potential to affect the Department." The Handbook further provides that "[e]mployees shall not engage in illegal or disorderly conduct including . . . immoral or indecent conduct, or participate in any activity, misconduct or behavior in the workplace and/or while on duty which may have a negative effect on the Department's reputation and/or community standing." The State of Iowa Employee Handbook adds that disciplinary action may be based on dishonesty, theft, conduct unbecoming a public employee, misconduct, or any other just cause.

The State has generally referred to Wilkerson-Moore's conduct as misuse of funds, but has also equated it to theft. Many definitions of theft exist. Under one such definition of theft, the employee would need to have a clear intent to steal or defraud. *See* ABA SECTION OF LABOR & EMPLOYMENT LAW, DISCIPLINE AND DISCHARGE IN ARBITRATION, 226 (Norman Brand 1998). To determine whether there is a clear intent to steal or defraud, an arbitrator examines the following: first, the goods belonged to the employer, another employee, the public, or the customer; second, the employee exercised control over the goods or converted goods for his or her own use; third, the goods were taken without express or implied

consent; and fourth, the goods were taken with the intent to steal or the intent to deprive the owner of the property permanently. ABA SECTION OF LABOR & EMPLOYMENT LAW, DISCIPLINE AND DISCHARGE IN ARBITRATION, 226 (Norman Brand 1998). The intent to steal only exists when the employee knowingly and willfully takes something without permission. *Id.* The intent to steal is distinguished from situations where the employee exercised poor judgment or intended to borrow and return the goods. *Id.*

Although Wilkerson-Moore admitted to using the donated funds for her own personal use, she also repeatedly stated that she borrowed the money. Through the investigation Slaybaugh and Bruett established that \$6 was missing from the funds that were to be donated to the Food Bank. Although there was a discrepancy between what Wilkerson-Moore told Lane-Molinari was raised and what was turned in to the Food Bank, the investigation did not demonstrate that money was ever missing out of any envelope prior to the envelope Bruett collected in September. The State's haphazard collection and recordkeeping of the money turned in to the Food Bank did not yield an answer on whether additional money was missing with any certainty.

Using Brand's definition of theft, Wilkerson-Moore did not have the requisite intent for theft. Wilkerson-Moore did not intend to permanently deprive the Food Bank of the money. She intended to repay the money.

Under Brand, Wilkerson-Moore exercised poor judgment. However, the Iowa Code does not have the "permanent deprivation" element in its

definition of theft; thus, Wilkerson-Moore's conduct may have amounted to an simple misdemeanor theft in the Iowa Code. *See* Iowa Code § 714.1 (defining theft); 714.2(5) (defining simple misdemeanor theft as theft of property not exceeding \$200).

Regardless of whether this misuse of the funds rises to the level of theft or illegal or unethical conduct under the DHS Employee Handbook Section A-2 Code of Conduct, it certainly constitutes misconduct in the workplace that "may have a negative effect on the Department's reputation" under Section D-1 of the DHS Employee Handbook. Further, Wilkerson-Moore's actions and poor judgment in her use of the donated funds for personal use would constitute "misconduct" and could fit in the category of "any other just cause" as described in the State of Iowa Employee Handbook. Consequently, I conclude the State provided sufficient proof that Wilkerson-Moore violated the work rules by her misuse of the employee-donated Food Bank funds for her personal use. Wilkerson-Moore admitted in the investigatory interviews and in her testimony that she took money from the envelope containing the employee-donated funds for the Food Bank for her own personal use.

The State has established that Wilkerson-Moore borrowed employee-donated funds multiple times for her personal use and that at the time of the investigation \$6 of the employee-donated funds was missing.

Reasons for discipline were adequately communicated

As noted earlier, the State's termination letter adequately described the actions that led to Wilkerson-Moore's discharge. In its notice of discharge to Wilkerson-Moore, the State also included the appropriate work rules that predicated her termination. Additionally, Bruett specifically told Wilkerson-Moore in her investigatory interviews that the purpose of the interview was to gather facts relating to alleged misuse of Food Bank funds for personal use.

Knowledge of Expected Conduct

Wilkerson-Moore had been given and signed acknowledgement of receipt of the DHS Handbook and the State Employee Handbook, both of which contained provisions the State claims Wilkerson-Moore violated. Wilkerson-Moore knew that misconduct that could have a negative effect on the Department's reputation would be grounds for discipline. Further, Wilkerson-Moore admitted that she knew she should not be taking money that had been donated for the Food Bank through the Jeans Day fundraiser.

The fact that Wilkerson-Moore was not instructed on how to accept, maintain, and record the funds donated to the Food Bank through the Jeans Day fundraiser, does not excuse her poor judgment. Wilkerson-Moore knew the money raised was not for her own personal use, and she borrowed the money anyway without permission. Wilkerson-Moore needed no training to understand that using the

donated money for her own personal use, regardless of her intent to pay it back, was unacceptable conduct.

*Sufficient and Fair Investigation*

Slaybaugh, Wilkerson-Moore's supervisor, and Bruett conducted the investigation. They interviewed Wilkerson-Moore on two, non-consecutive days regarding her alleged misuse of money. They also interviewed Lane-Molinari, a coworker that reported the alleged misuse of Food Bank funds to Slaybaugh.

Bruett and Slaybaugh interviewed Wilkerson-Moore then waited a few days before the subsequent interview. Wilkerson-Moore had an opportunity to respond and ask questions. Slaybaugh and Bruett also heard Wilkerson-Moore's testimony on certain incidents, such as who picked up the envelopes that went to the Food Bank, which led to Slaybaugh and Bruett re-interviewing Lane-Molinari to verify that information.

Although the interview process could have been more extensive, the investigation was sufficient to demonstrate that Wilkerson-Moore did misuse employee-donated funds as Wilkerson-Moore admitted to the misconduct. The investigation also fairly gave Wilkerson-Moore an opportunity to explain her alleged misconduct.

Progressive discipline followed/Punishment proportionate to offense

PERB has consistently considered whether the State has used a system of progressive discipline when determining whether the discipline imposed was proportionate to the offense.

Progressive discipline is a system where measures of increasing severity are applied to repeated offenses until the behavior is corrected or it becomes clear that it cannot be corrected. *Nimry and State of Iowa (Dep't of Natural Resources)*, 08-MA-09, 08-MA-18, at App. 30. Progressive discipline is used to encourage employees to take corrective responsibility to follow work rules and employment obligations. *Stockbridge and State of Iowa (Dep't Of Corrections)*, 06-MA-06 at 28. Progressive discipline addresses employee's behavior over time through escalating penalties. The purpose is to correct the unacceptable behavior of an employee and to convey the seriousness of the behavior while affording the employee an opportunity to improve. *Phillips and State of Iowa (Dep't of Human Services)*, 12-MA-05 at App. 16 (citing Norman Brand, *Discipline and Discharge in Arbitration* at 57 (BNA Books 1998)). When determining what discipline is appropriate, PERB considers the totality of the circumstances. *Hoffman and State of Iowa*, 93-MA-21 at 12.

Progressive discipline may be inapplicable when the conduct underlying the discipline was a serious offense. *Phillips and State of Iowa (Dep't of Human Services)*, 12-MA-05 at App. 1, 13, 16-18 (finding an

employee's breach of confidentiality a serious offense and imposing a 10-day suspension when the employee knowingly disclosed the information and the employee's job description involves maintenance of confidential records). When determining the appropriate type of discipline given the circumstances, PERB examines the severity and extent of violations, the position of responsibility held by the employee, the employee's prior work record, and whether the employer has developed a lack of trust and confidence in the employee to allow the employee to continue in that position, taking into account the conduct at the basis of the disciplinary action. *Phillips and State of Iowa (Dep't of Corrections)*, 98 H.O. 09 at 15; *Estate of Salier and State of Iowa (Dep't of Corrections)*, 95-HO-05 at 17.

Generally, arbitrators do not require the use of progressive discipline when there is a clear intent to steal or defraud because the conduct has damaged the trusted relationship between the employer and employee. ABA SECTION OF LABOR & EMPLOYMENT LAW, DISCIPLINE AND DISCHARGE IN ARBITRATION, 226-27 (Norman Brand 1998). When there is a clear intent to steal or defraud, many arbitrators take a strict approach that no mitigating factors can or should lessen the disciplinary penalty because the bond of trust was breached. *Id.* at 225. Other arbitrators will look at the employment record, length of service, harm to the employer, motivation of employee, or the employee's attempts to deny the conduct. *Id.*

As previously stated, however, Wilkerson-Moore did not have a clear intent to steal or defraud. Under the definition provided by Brand, Wilkerson-Moore's conduct did not amount to theft as Wilkerson-Moore intended to repay the money. *See id.* at 228. Additionally, some arbitrators would find that Wilkerson-Moore's conduct did not amount to theft because \$6 is a minor value and with such a small amount of money the "intent" to steal clearly was not present. *Id.*

PERB has ruled in one case involving the taking of goods during employment. In *Sells*, the employee took State property and turned it over to a private firm, without any authority to do so. *Sells and State of Iowa (Dep't of Natural Resources)*, 94 H.O. 06 at 7, 13. The employee bought a boat engine at a Department of Natural Resources auction and then sold that boat engine. *Id.* The engine did not have a cable, so the employee took a cable from the department without permission. *Id.* The Board determined this action was a thoughtless action, not a criminal action as the employee did not knowingly steal the cable. *Id.* The employee assumed the cable should have been with the boat engine that he rightfully purchased. *Id.* The Board ruled that the employee acted in bad judgment, and upheld a one-day suspension. *Id.*

Wilkerson-Moore exercised extremely poor judgment and engaged in potentially criminal conduct in using the Food Bank money for her own personal use. Wilkerson-Moore's actions in misusing funds intended for the Food Bank, despite her intent to repay, deserves discipline, but is

not so severe as to remove this case entirely from the sphere of progressive discipline.

In Wilkerson-Moore's position as a confidential secretary, she handled money and receipts. This position requires the employer to have a higher degree of trust in the employee. The State has not shown that Wilkerson-Moore ever had any issues when collecting or accounting for State or client money. Additionally, Wilkerson-Moore's work record is above reproach. She met or exceeded tasks and had an overall rating of meeting expectations when she was evaluated. Even her terminating supervisor, Slaybaugh, characterized Wilkerson-Moore as a "reasonably good employee." Wilkerson-Moore had no prior discipline in her twenty plus years at the State. Slaybaugh contends that she needed to have a high level of trust in her confidential secretary. She claimed that due to the misuse of Food Bank funds, she believed her trust in Wilkerson-Moore was "irreparably damaged" and this led to her decision to terminate Wilkerson-Moore.

Although Slaybaugh may believe the trust level has diminished due to Wilkerson-Moore's poor judgment, her belief alone cannot be the basis for the discipline. Wilkerson-Moore's actions were not enough to establish just cause for the ultimate sanction of termination.

Employment record (years of service, performance, disciplinary record)  
given due consideration

As stated above, PERB considers the employment record when determining whether the State had just cause for its imposed discipline. Even when examining a case where an employee took State property without permission, the Board has discussed the employee's employment record. *See Sells*, 94 H.O. at 7 (finding the employee's long service record, high quality work, lack of prior discipline, and his duty as a supervisory employee led to the determination of a one-day suspension); *see also Hoffman and State*, 93-MA-21 at 13 (discussing the employee's employment history and record and finding the termination imposed was unreasonable and not proportionate to the offense as the State had established just cause for discipline, but not for discharge).

Wilkerson-Moore worked for the State of Iowa for over twenty years. During that time, she had positive evaluations. She never received discipline. All these circumstances act to mitigate the State's discipline of Wilkerson-Moore for her exercise of poor judgment. The job duties, work performance, and evaluations are still important considerations when there is a violation of work rules involving alleged ethical or criminal misconduct. Even when an offense is so egregious that it may outweigh the employee's employment record, these considerations should be considered. Given Wilkerson-Moore's longevity, lack of disciplinary

history, and positive evaluations, termination was not an appropriate response for her misconduct.

*Other mitigating circumstances justifying lesser penalty*

Wilkerson-Moore misused employee-donated funds. She was entrusted with funds that her fellow coworkers had donated to the Food Bank, and she mishandled and misused that money. However, Wilkerson-Moore did not misuse State property and Wilkerson-Moore did not misuse this donated money during the course of her normal work duties. This was a case of extremely poor judgment by an employee, but this action was part of her extracurricular activities, and as such, it should not carry as severe a penalty as it would have if Wilkerson-Moore misused State property or misused property in the course of her normal work duties.

Furthermore, Wilkerson-Moore intended to repay the money. Although any misuse of money is inappropriate, Wilkerson-Moore's intent to repay the money also adds weight to a lesser penalty than termination.

Additionally, the amount the State has demonstrated that Wilkerson-Moore misused was a minor amount. The State has only demonstrated that \$6 of the money intended for the Food Bank was missing. While misusing any amount of money may justify discipline, the relatively minor amount of money justifies a penalty of less than termination.

### Treatment of Similarly Situated Employees

Neither party has presented evidence on the treatment of similarly situated employees. The State presented no evidence on how other individuals that were alleged to have violated rules regarding misconduct or unethical behavior were treated. The State argues that theft is a terminable offense, but failed to provide any support for this statement. While I agree that theft is a serious offense and may be a terminable offense, the mitigating factors addressed above in this case weigh in favor of a lesser discipline.

### CONCLUSION

PERB looks at the totality of the circumstances in deciding whether the employer has just cause for the discipline of the employee. *Estate of Salier and State of Iowa (Dep't of Corrections)*, 95-HO-05 at 16-17. In this case the State has not shown just cause for Wilkerson-Moore's termination. Wilkerson-Moore engaged in poor judgment and potentially criminal conduct that led to a diminishment of trust between her and her supervisor. Further Wilkerson-Moore's position within the fiscal division of DHS requires a higher level of scrutiny when dealing with money and State property. Discipline is warranted. However, Wilkerson-Moore did not take State property or client property, she did not take money as part of her work-assigned duties, she intended to repay the money, and the amount of money she took was nominal.

Additionally, Wilkerson-Moore has had a long career with the State without any discipline.

Although Wilkerson-Moore's conduct is serious, it is not so egregious as to forgo all the steps of progressive discipline and proceed to the ultimate discipline of termination. *See, e.g., Hoffman and State of Iowa*, 93-MA-21, at 13 (finding Hoffman's conduct in sending a discourteous letter amounted to insubordination, but this conduct was disproportionate to termination); *Sells and State of Iowa (Dep't of Natural Resources)*, 94 H.O. 06 at 7, 13 (upholding a one-day suspension for misuse of State property). The State did not impose discipline that was proportionate to Wilkerson-Moore's actions, especially considering the mitigating circumstances such as her employment and disciplinary history and the circumstances surrounding the misconduct. The State did not have just cause for termination of Wilkerson-Moore.

Having determined that the State failed to establish just cause for Wilkerson-Moore's termination, but that disciplinary action was warranted, I must fashion the appropriate remedy. Based on the totality of the circumstances, I find that a five-day suspension is warranted.

Consequently, I propose the following:

#### ORDER

The Department of Human Services shall reinstate Sharon Wilkerson-Moore to her former position as confidential secretary in the Department of Human Services, Fiscal Management Division (if the

position still exists, and if not, to a substantially equivalent position), with back pay and benefits, less interim earnings; restore her benefit accounts to reflect accumulations she would have received but for her discharge; make appropriate adjustments to her personnel records, and take all other actions necessary to restore her to the position she would have been in had her employment not been terminated on September 12, 2016, but had instead received an unpaid five-day suspension.

This proposed decision and order will become PERB's final agency action on the merits of Wilkerson-Moore'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 motion.

This ALJ retains jurisdiction of this matter in order to address any remedy-related issues which might hereafter arise and to specify the precise terms of the remedy. In order to prevent further delay in the resolution of this case, 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 on the merits of Wilkerson-Moore's appeal.

DATED at Des Moines, Iowa this 5th day of December, 2017.

/s/ Amber DeSmet  
Administrative Law Judge

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