

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

**STATE OF IOWA (DEPARTMENT OF
HUMAN SERVICES FISCAL
MANAGEMENT DIVISION),**

Petitioner,

v.

**IOWA PUBLIC EMPLOYMENT
RELATIONS BOARD,**

Respondent,

and

**SHARON WILKERSON-MOORE,
Intervenor.**

Case No. CVCV056149

**RULING ON PETITION
FOR JUDICIAL REVIEW**

INTRODUCTION

The above-captioned matter came before the court on August 16, 2018. Petitioner, the State of Iowa (Department of Human Services Fiscal Management Division) (“DHS-FMD”) was represented by Attorney Molly Weber. Respondent, Iowa Public Employment Relations Board (“PERB”) was represented by Diana Machir. Intervenor, Sharon Wilkerson-Moore (“Wilkerson-Moore”) was represented by Attorney Christopher Stewart. Upon review of the court file and applicable law, the court enters the following order.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Wilkerson-Moore began her employment with the State of Iowa in June 1994 as a Secretary 2. Wilkerson-Moore has worked for the State of Iowa since that time with the exception of a six-month budgetary layoff in 2006. In January 2010, she transferred to DHS-FMD as a Secretary 2. While there, she served as a confidential secretary to the division’s Chief

Financial Officer, Jean Slaybaugh (“Slaybaugh”). Wilkerson-Moore’s duties included setting meetings, sending emails, making reservations, ordering supplies, doing payroll, accepting cash receipts, and providing receipts for various DHS programs. Throughout her employment at the State of Iowa, with the exception of the events that gave rise to her termination, Wilkerson-Moore was never formally disciplined and received evaluations that she either met or exceeded expectations.

Wilkerson-Moore also served on a social committee with her co-worker, Jody Lane-Molnari (“Lane-Molnari”) to assist in organizing the division’s charitable and social events. Pursuant to her work on that committee, Slaybaugh asked Wilkerson-Moore to be in charge of collecting money for the division’s “Jeans Day” fundraiser. The fundraiser allowed employees to pay a dollar on specific days to wear jeans to work. The fundraiser raised money for the Food Bank of Iowa. Wilkerson-Moore’s coworkers would give her the money, which she was to save and give to an unspecified individual when asked for it. One of the individuals who collected the funds was an employee named Ron Bruett (“Bruett”). Coworkers would occasionally leave “IOU’s” for the Jeans Day fund, hand Wilkerson-Moore money when she was away from her desk, and leave money on her desk when she wasn’t there, making it difficult for her to manage the funds. Wilkerson-Moore managed the Jeans Day funds from August 2015 to August 2016.

On September 9, 2016, Lane-Molnari attempted to collect the Jeans Day funds from Wilkerson-Moore. According to Wilkerson-Moore’s records, the envelope should have contained \$7, but the envelope only contained \$1. Following this interaction, Lane-Molnari reported her concerns about the funds to Slaybaugh, and Slaybaugh and Bruett conducted an internal investigation regarding the missing funds. Slaybaugh and Bruett interviewed Lane-Molnari twice, and Wilkerson-Moore once. During her interview, Wilkerson-Moore admitted

that she had taken money from the fund on more than one occasion, but insisted that she had taken it with the intent to pay it back. The day of her interview, September 9, 2016, Wilkerson-Moore was suspended pending the result of the investigation.

During the course of the investigation, Slaybaugh and Bruett discovered a number of discrepancies in the accounting of the Jeans Day fund. Due to inconsistencies in the reporting of the funds and the amount collected, as well as inconsistencies with who picked up the money and when, the exact amount of money that was missing from the fund was unclear. The only amount of money that Slaybaugh and Bruett were able to conclusively determine was missing was the \$6 that was missing on September 9. Following the investigation, DHS-FMD determined that Wilkerson-Moore was in violation of the DHS standards of conduct and work rules. Slaybaugh determined that the best course of action was to terminate Wilkerson-Moore's employment. On September 12, 2016, Slaybaugh sent a letter to Wilkerson-Moore explaining that she was being discharged from the employment. The letter stated, in pertinent part, "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."

Following her termination, Wilkerson-Moore filed a non-contract grievance. The non-contract grievance was denied on December 2, 2016. Wilkerson-Moore appealed the matter, and on April 18, 2017, an evidentiary hearing was conducted in front of an Administrative Law Judge ("ALJ"). The ALJ issued a proposed decision on December 5, 2017, concluding that the State had not established just cause for Wilkerson-Moore's termination, and that Wilkerson-Moore's conduct warranted the imposition of a five-day suspension. The ALJ ordered Wilkerson-Moore's reinstatement to her former position with back pay and restoration of

benefits. DHS-FMD filed a petition for PERB's review of the ALJ decision on December 14, 2017. PERB heard oral arguments from the parties on February 22, 2018. PERB issued its decision on March 14, 2018. With noted modifications to the findings of fact and conclusions of law, PERB agreed with the ALJ's findings of fact and conclusion that the State had not established just cause to support its termination of Wilkerson-Moore. DHS-FMD filed its Petition for Judicial Review on April 13, 2018.

STANDARD OF REVIEW

Chapter 17A of the Iowa Code governs judicial review of administrative agency action. The district court acts in an appellate capacity to correct errors of law on the part of the agency. Meyer v. IBP, Inc., 710 N.W.2d 213, 219 (Iowa 2006). Relief is appropriate where "substantial rights of a party have been prejudiced because the agency action [...] is unsupported by substantial evidence, is unreasonable, arbitrary, or capricious, or is affected by other error of law." Dico, Inc. v. Iowa Emp't Appeal Bd., 576 N.W.2d 352, 354 (Iowa 1998). The standard of review on appeal depends on whether the basis for the petition involves an issue of finding of fact, interpretation of law, or application of law to fact. Meyer, 710 N.W.2d at 218-19.

The standard when the claim is that there was an error in finding of fact is whether the agency's decision is supported by substantial evidence. Id. at 218. When the claim is that an agency made an incorrect interpretation of law, the question is whether the agency's interpretation was erroneous. Id. at 219. If the agency's interpretation is erroneous, the court is not bound by the agency's interpretation and may substitute its own interpretation. Id. If the challenge is to the application of the law to the facts, then the claim of error lies with the ultimate conclusion reached. Id. The question in these circumstances is "whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and

relevant evidence.” Id. “The burden of demonstrating the required prejudice and the invalidity of agency action is on the party asserting invalidity.” Iowa Code § 17A.19(8)(a).

APPLICABLE LAW & ANALYSIS

DHS-FMD asserts three arguments as to why PERB’s decision should be reversed. First, that PERB’s decision is based on factual errors; second, that PERB’s decision is based upon misapplications of the law to fact; and third, that PERB applied an erroneous interpretation of law and that just cause existed to support the employment termination. PERB counters that there was substantial evidence to support its factual findings and that its decision was not based on an irrational, illogical, or wholly unjustifiable application of law to fact. Wilkerson-Moore adds that her termination was not based upon just cause.

Findings of Fact

The standard of review when the claim is that an agency made an error in finding of fact is whether the agency's decision is supported by substantial evidence. Meyer, 710 N.W.2d at 218. In evaluating whether there is substantial evidence, the court views the record as a whole. Iowa Code § 17A.19(10)(f). When determining whether there is substantial evidence before the court when the record is viewed as a whole, the court uses the following definitions:

- (1) “Substantial evidence” means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.
- (2) “Record before the court” means the agency record for judicial review, as defined by this chapter, supplemented by any additional evidence received by the court under the provisions of this chapter.
- (3) “When that record is viewed as a whole” means that the adequacy of the evidence in the record before the court to support a particular finding of fact must be judged in light of all the relevant evidence in the record cited by any party that detracts from that finding as well as all of the relevant evidence in the record cited by any party that supports it, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witnesses and the

agency's explanation of why the relevant evidence in the record supports its material findings of fact.

Iowa Code §§ 17A.19(10)(f)(1)-(3). The question is not whether the evidence supports a different finding than the one made by the agency, but rather whether the evidence supports the findings actually made. Meyer, 710 N.W.2d at 218. “An agency’s decision does not lack substantial evidence because inconsistent conclusions may be drawn from the same evidence.” IBP v. Harpole, 621 N.W.2d 410, 418 (Iowa 2001)(quoting Second Injury Fund v. Shank, 516 N.W.2d 808m 812 (Iowa 1994)).

Specifically, DHS-FMD argues that there was not substantial evidence in the record for PERB’s determination that keeping track of donations or charitable contributions was not done in Wilkerson-Moore’s official capacity as a confidential secretary. DHS-FMD takes issue with PERB’s finding that the collection of money and accounting of the Jeans Day fund were not work related. DHS-FMD argues that there is not substantial evidence in the record to support these findings. Instead, DHS-FMD points to Wilkerson-Moore’s PDQ, which includes a category of 5% “Other duties as assigned,” as evidence that collection of the funds was a part of Wilkerson-Moore’s job duties. DHS-FMD argues that because Slaybaugh assigned the task to Wilkerson-Moore, the collection of funds was a part of her job duties.

PERB argues that there was substantial evidence to support a finding that the Jeans Day fund activities were voluntary social activities that were not work-related job functions for Wilkerson-Moore. PERB relies on evidence that the Food Bank activities, including the Jeans Day fund, were voluntarily carried out by an unofficial social committee. PERB points out that DHS-FMD’s witness, Lane-Molnari, characterized the committee as an unofficial social committee in her testimony. PERB also relies on the

testimony of Slaybaugh that the activities of the committee were not a part of Slaybaugh's official job duties. PERB asserts that there is substantial evidence in the record to support the finding that the Jeans Day fund activities were not a part of Wilkerson-Moore's job functions and duties.

The court finds that there is substantial evidence in the record to support the finding that the Jeans Day funds were not a part of Wilkerson-Moore's official capacity as confidential secretary. DHS-FMD's witnesses testified at the evidentiary hearing before the ALJ that the committee was voluntary. Lane-Molnari testified regarding the Food Bank committee, "I would say it's an unofficial social committee that we have within our division." R. Tab 30 at 58. Slaybaugh was questioned about charitable work for the Food Bank and testified as follows:

- Q. Okay. But it's not something you're employed to do?
- A. No.
- Q. It's not an activity you do as part of what your function is for your job as the CFO of DHS?
- A. Correct. It's voluntary.

R. Tab 30 at 53. When further questioned about the nature of the division's work regarding the Food Bank on re-cross examination, Slaybaugh testified:

- Q. And you would agree - - would you agree that the activities committee, or however you put Jeans - - came up with the Jeans Day, it was not a State specific or State-sponsored job to set up these Jeans Days; correct?
- A. Will you - -
- Q. A State-sponsored duty to set up these Jeans Days? It wasn't a required task or a required duty to set these specific days up?
- A. It was not required. It was voluntary.
- Q. So it was a voluntary duty - - I guess a voluntary activity that employees could partake in?
- A. Correct.

R. Tab 30 at 55-56.

Though DHS-FMD points to Wilkerson-Moore's PDQ as proof that collecting the funds was a part of Wilkerson-Moore's job duties, the PDQ does not contain any information regarding collection of charitable funds. R. Tab 28 Exhibit D. DHS-FMD relies on the "Other duties as assigned" language in the PDQ, but Slaybaugh testified in regard to collection of Jeans Day funds that Wilkerson-Moore "was asked if it was something that she would do." R. Tab 30 at 42. Wilkerson-Moore was not assigned to collect the funds, she was asked to volunteer. There is substantial evidence in the record to support PERB's findings regarding the nature of Wilkerson-Moore's activities for the Jeans Day fund collection.

Application of Law to Fact

The standard of review when the claim is that the agency incorrectly applied the law to the facts is whether the agency abused its discretion by employing wholly irrational reasoning or ignoring important and relevant evidence. Meyer, 710 N.W.2d at 219. If the claim of error is the ultimate conclusion reached by the agency, then the challenge is to the agency's application of the law to the facts. Id. The court may disturb the agency's application of law to facts only if that application is "irrational, illogical, or wholly unjustifiable." Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 256 (Iowa 2012). "A decision is 'irrational' when it is 'not governed by or according to reason.' A decision is 'illogical' when it is 'contrary to or devoid of logic.' A decision is 'unjustifiable' when it has no foundation in fact or reason." Id. at 265 (quoting Shermin-Williams Co. v. Iowa Dep't of Revenue, 789 N.W.2d 417, 432 (Iowa 2010)).

DHS-FMD argues that PERB incorrectly applied the law to the facts for three reasons. First, that PERB should have considered the matter as theft rather than misuse. Second, that PERB improperly gave mitigating weight to several facts. Third, that PERB was incorrect in its determination that DHS-FMD did not establish just cause for the termination of Wilkerson-

Moore's employment. In each of its arguments, DHS-FMD challenges the ultimate conclusion reached, and as a result the question is whether PERB incorrectly applied the law to the facts and whether that application is irrational, illogical, or wholly unjustifiable.

Theft vs. Misuse

DHS-FMD argues that PERB incorrectly applied the facts to the law in its qualification of Wilkerson-Moore's conduct as misuse of funds rather than theft. PERB maintains that it evaluated just cause using misuse rather than theft because theft was not a stated reason for the State's termination of Wilkerson-Moore's employment. The State human resource management rules indicate that a "person discharged, suspended, or reduced shall be given a written statement of the reasons for the discharge, suspension, or reduction within twenty-four hours after the discharge, suspension, or reduction." Iowa Code § 8A.413(18)(b). The presence or absence of just cause must be determined upon the stated reasons in the written statement alone. In re Eaves and State (Dep't of Corr.), No. 03-MA-04, 2003 WL 25771134, at *7 (IA PERB 2003).

PERB based its analysis upon misuse of funds because the letter that Wilkerson-Moore received upon her termination of employment based her termination on misuse of funds. The letter stated, in relevant part, "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." R. Tab 29 Exhibit 4 at 1. The court does not find that this application of law to facts was irrational, illogical, or wholly unjustifiable. PERB conducted its just cause analysis using misuse of funds rather than theft because Wilkerson-Moore's termination letter explained that she was being terminated because of misuse of funds. The letter does not mention theft as a reason for her termination.

DHS-FMD relies upon Phillips and State of Iowa (Dep't of Corr.) to argue that Wilkerson-Moore was adequately apprised of an allegation of theft. In that case, the written notice to the employee was vague as to specific incidents, but PERB found that the employee was adequately apprised of the types of conduct that were alleged to have occurred. See Phillips and State of Iowa (Dep't of Corr), 98-MA-09, 1999 WL 34970342 (IA PERB 1999). In this case, however, the written notice to Wilkerson-Moore was specific. The letter stated that her termination was based upon misuse of funds. At no time prior to the termination of her employment did DHS-FMD qualify Wilkerson-Moore's conduct as theft. In the investigatory interview, Bruett explained that, "the purpose of this interview is to gather facts related to an allegation of inappropriate behavior by a staff member which is alleged misuse of Food Bank funds for personal use." R. Tab 29 Exhibit 6 at 1. It does not matter that following Wilkerson-Moore's termination DHS-FMD presented arguments regarding theft at the ALJ hearing. The relevant consideration is what Wilkerson-Moore was apprised of prior to the termination of her employment. PERB's analysis regarding misuse of funds was not irrational, illogical, or wholly unjustifiable.

Mitigating Factors

DHS-FMD contends that PERB incorrectly applied the law to the facts in considering several factors that it deemed to be mitigating. Those factors include:

- 1) Wilkerson-Moore did not take the money with the intent to steal, but with the intent to repay the money;
- 2) The Jeans Day funds were not State funds;
- 3) The Jeans Day fund was difficult for Wilkerson-Moore to maintain;
- 4) Wilkerson-Moore was given little guidance regarding the Jeans Day fund; and
- 5) The investigatory interview process conducted by Slaybaugh and Bruett was insufficient.

DHS-FMD argues that PERB gave these factors mitigating weight in determining whether just cause was established. DHS-FMD claims that this was in error because these factors are

immaterial, and in the case of the Jeans Day funds not being State funds, the factor may even be aggravating.

In determining whether just cause exists, there is no fixed test to be applied. Gleiser and State of Iowa (Dep't of Transp.), No. 09-MA-01, 2010 WL 8727529, at *8 (IA PERB 2010).

Examples of factors that may be relevant to a just cause determination 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 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

Id. There is not a fixed test for determining whether just cause exists, rather, “just cause determination requires 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.” Id.

The very factors that DHS-FMD considers immaterial have been enumerated as examples of what PERB should evaluate in determining whether just cause exists. PERB is allowed to consider the sufficiency of the employer's investigation, proportionality of the punishment to the offense, and other mitigating circumstances that might justify a lesser penalty. PERB found that the investigation was insufficient because only one interview was conducted with Wilkerson-Moore, and many questions regarding the Jeans Day fund were left unanswered. PERB found Wilkerson-Moore's intent to repay the money she took relevant because other individuals had

left IOU's in lieu of paying to the fund, and the State did not explain why it was allowable for one of those individuals to owe the fund money but not Wilkerson-Moore. PERB found the lack of guidance regarding the fund and the difficulty that Wilkerson-Moore had in maintaining the fund relevant for similar reasons. In examining the circumstances leading up to Wilkerson-Moore's termination, PERB was fulfilling its duty to analyze all relevant circumstances concerning the conduct that resulted in the termination. The court does not find that PERB's consideration of these factors was irrational, illogical, or wholly unjustifiable.

Just Cause for Termination

First, DHS-FMD argues that PERB's decision was based on an erroneous interpretation of a provision of law. DHS-FMD asserts that the agency has not been clearly vested with the authority to interpret Iowa Code § 17A.19(10)(c) regarding the definition of just cause. If the legislature has not clearly vested the agency with the authority to interpret a particular section, the court reviews the agency's decision for correction of errors at law. Abbas v. Iowa Ins. Div., 893 N.W.2d 879, 886 (Iowa 2017)(citations omitted). DHS-FMD faults PERB for relying on its own prior case law in analyzing the definition of just cause in this case, even though DHS-FMD likewise relies on prior PERB case law in advancing its own arguments. Neither party has cited authority relevant to whether PERB has been vested with the authority to interpret the definition of just cause, however, a couple of cases from the Iowa Court of Appeals are illustrative.

In Hicok v. Iowa Emp't Appeal Bd, the Court considered the applicable standards for reviewing a determination of just cause made by the Employment Appeal Board. See Hicok v. Iowa Emp't Appeal Bd., 808 N.W.2d 755 (Table) 2011 WL 5391652 (Iowa Ct. App. 2011). In that case, the Court noted that "if authority is vested with the agency, we can only reverse the Board's application of [...] the good cause standard if the application is 'irrational, illogical, or

wholly unjustifiable.” Id. at *4 (quoting Titan Tire Corp. v. Emp’t Appeal Bd., 641 N.W.2d 752, 755 (Iowa 2002)). The Court then went on to apply the irrational, illogical, or wholly unjustifiable standard. Hicok, 2011 WL at *8. In Fort Dodge Cmty. School Dist. V. Iowa Public Emp’t Relations Bd., the Court considered the authority and rationale behind PERB’s interpretation of a statute, and concluded that PERB cited sufficient authority in support of its interpretation. Fort Dodge Cmty. School Dist. v. Iowa Public Emp’t Relations Bd., 855 N.W.2d 733, 740-41 (Iowa Ct. App. 2014). In that case, PERB considered, among other things, its own prior interpretations, relevant case law, and dictionary definitions of the term. Id. at 740.

In this case, PERB based its analysis of just cause on factors that PERB has traditionally considered when evaluating just cause. The case that PERB cites to, Gleiser, refers to several prior PERB decisions for authority in its just cause interpretation. Gleiser, 2010 WL at *8. The cases that PERB references are Harrison and State of Iowa (DHS), 05-MA-04; Woods and State of Iowa (DIA), 03-MA-01 (2004); and Hoffman and State of Iowa (DOT), 93-MA-21 (1993). The court finds that PERB considered sufficient authority in its interpretation of just cause, and as a result its analysis is not irrational, illogical, or wholly unjustifiable.

Finally, DHS-FMD argues that even if PERB had authority to interpret just cause, PERB incorrectly applied the law to the facts in determining that DHS-FMD did not have just cause for termination, but instead had just cause for a five-day suspension. In considering whether just cause exists, PERB may consider whether the punishment imposed is proportionate to the offence, whether progressive discipline was followed, and whether the employee's employment record, including years of service, performance, and disciplinary record, have been given due consideration. Gleiser, 2010 WL at *8. DHS-FMD argues that the actions taken by Wilkerson-Moore were severe enough to make progressive discipline inapplicable.

PERB considered all of the factors advanced by DHS-FMD. PERB also considered the factors addressed above that it deemed to have mitigating effect. PERB reviewed Wilkerson-Moore's employment record, which spanned over twenty years. Prior to this instance, Wilkerson-Moore had never been formally disciplined. Wilkerson-Moore's employment evaluations indicated that she had always either met or exceeded expectations. PERB considered the totality of the circumstances and the arguments advanced by DHS-FMD as well as Wilkerson-Moore. The court concludes that PERB's determination that just cause did not exist for termination but just cause did exist for a five-day suspension was not irrational, illogical, or wholly unjustifiable.

CONCLUSION

IT IS THEREFORE ORDERED that the decision of the Iowa Public Employment Relations Board is **AFFIRMED**.

IT IS FURTHER ORDERED that Petitioner's request for Judicial Review of Agency Action requesting the Court reverse the decision of the Iowa Public Employment Relations Board is **DENIED** and the petition for judicial review is dismissed with prejudice. Costs are assessed to the Petitioner.



State of Iowa Courts

Type: OTHER ORDER

Case Number CVCV056149
Case Title STATE OF IOWA VS IOWA PUBLIC EMPLOYMNT RELATIONS BOARD ET AL

So Ordered

Michael D. Huppert, District Court Judge,
Fifth Judicial District of Iowa