

**IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY**

<p><b>STATE OF IOWA,</b> <i>Petitioner,</i> v. <b>IOWA PUBLIC EMPLOYMENT RELATIONS BOARD,</b> <i>Respondent,</i> and <b>NICHOLAS CARNES,</b> <i>Intervenor.</i></p>	<p><b>Case No. CVCV058737</b></p> <p><b>RULING ON PETITION FOR JUDICIAL REVIEW</b></p>
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This matter came before the Court on December 6, 2019, for hearing on review of a final decision of the Iowa Public Employment Relations Board (“PERB”). Petitioner, State of Iowa (“State”), was represented by Assistant Attorney General Molly Weber. Respondent, PERB, was represented by Attorney Diana Machir. Intervenor, Nicholas Carnes (“Carnes”), was represented by Attorney Mark Hedberg. Upon review of the court file and the applicable law, the Court enters the following order:

**I. BACKGROUND FACTS AND PROCEDURAL POSTURE.**

The facts of this case are not in dispute. Carnes was an employee at the Glenwood State Resource Center (“Glenwood”). While he began working there as a temporary worker in 2004, at the time of the incident, he was serving as a Power Plant Engineer. In the time prior to the incident, he had never been disciplined and had solely positive performance evaluations.

This Petition stems from an incident that occurred on Monday, September 18, 2017. A female sales representative (“RH”) visited Glenwood to meet with Carnes’ supervisor, John McComic, about selling industrial supplies to Glenwood. While she was at Glenwood, she met

Carnes and gave him her business card. Following their brief interaction, at 11:52 a.m., Carnes emailed RH from his personal email on his personal cell phone. Carnes said, “Hi my name is Nic Carnes I met you earlier today and had some questions for you that aren’t work related would you have time.” RH responded to the email and said, “Yes I do. Give me a call on my cell.” Carnes responded, “Ok Im shy and don’t want to sound like a weirdo.” RH responded, “Didn’t take it like that so your good. Im pretty laid back so when you are ready give me a call.”

At 2:00 p.m., Carnes called RH, and they discussed gearboxes and motors.<sup>1</sup> Carnes clocked out of work for the day at 3:01 p.m. Immediately after clocking out, Carnes sent RH a text message. While a large number of the text messages between Carnes and RH were deleted, it is clear the text messages got increasingly personal. Carnes and RH discussed if they were married. At one point, Carnes said, “I would have rock that box all night.” RH replied, “I’m sure you would have but we will have to leave that in a thought.” One of the final messages sent by Carnes was a picture of a penis he found on the internet.

At some point following her receipt of the picture of the penis, RH responded to Carnes telling him the message was inappropriate. Carnes sent two more text messages and then an email to RH to apologize for his behavior. The email ended with “I hope we can still be friends.” Concerned Carnes’ text communications may negatively impact her employment, RH deleted them from her cellular telephone. One week later, RH informed her supervisor of the incident. Her human resources department reported the incident to Glenwood Administrator Rick Shults.

On September 27, 2017, Carnes was suspended. Shelly Anderson, Human Resources Quality Assurance Coordinator, and Ron Bruett, Human Resource Generalist for the State of Iowa, investigated the matter. As part of their investigation, they interviewed the human resources

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<sup>1</sup> It is unclear to the Court if this discussion was work related or related to a personal project Carnes was working on.

manager of RH's employer and interviewed RH by phone. RH was removed from the Glenwood account for a period of time. Anderson and Bruett reviewed the text messages that were still available and interviewed Carnes. Carnes also provided a copy of his phone bill. The phone bill time stamps were in Mountain Time, making it originally appear that he sent the first text message during work hours. This was later corrected to reveal the first message was sent after he clocked out from work.

Anderson testified at the hearing that she recommended Carnes be terminated for his actions. Pursuant to the United States Supreme Court's directive in *Cleveland Board of Education v. Loudermill*, Carnes was given a due process hearing prior to his termination. 470 U.S. 532 (1985). After the hearing, they determined Carnes' actions rose to such an egregious violation that they needed to terminate his employment. They informed Carnes of his termination in a letter dated November 16, 2017. The letter stated:

This letter is to inform you that, effective 11/16/17, you are being discharged from employment with the Iowa Department of Human Services (DHS). This action is being taken as a result of our investigation. Specifically, the charges are that on September 18, 2017, you texted inappropriate sexually related messages and sent/texted an inappropriate photo of male genitalia to the Grainger Sales Account Manager on her work cell phone. Our investigation brought forth evidence, confirmed by your admission, which supports the Department's allegation. Your actions are in violation of the following DHS Department policies and work rules.

DHS Employee Handbook:

**Section A-1. Code of Conduct<sup>2</sup>**

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,

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<sup>2</sup> Although Carnes' termination letter identifies the noted section as "A-1," a review of the DHS Employee Handbook indicates that the noted section is "A-2."

relating to state employment, to their Supervisor, Appointing Authority or Department Director.

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

- 4. Employees shall avoid boisterous or inappropriate discussions and behavior.
- 21. Employees shall treat other employees, guests, visitors, and Department clients with dignity and respect.
- 23. Abuse of an employee's position or authority by requesting, forcing or engaging clients, other employees or visitors in consensual or nonconsensual sexual relations or sexually-related activities including sexually suggestive remarks is considered serious misconduct and shall result in disciplinary action up to and including discharge from employment and/or legal action against the employee.

Carnes appealed this decision pursuant to Iowa Code section 8A.415(2). An evidentiary hearing was held and a Proposed Decision and Order was issued by an administrative law judge (“ALJ”) on February 27, 2019. The ALJ found the State did not have just cause for terminating Carnes and that the progressive discipline process should have been used, warranting a 10-day suspension rather than termination. The ALJ ordered Carnes be reinstated to his former position with back pay, a restoration of benefits, and the necessary adjustments. This decision was appealed to PERB. Oral arguments were presented to PERB on May 16, 2019, and on July 19, 2019, PERB affirmed the ALJ’s decision.

On August 19, 2019, Petitioner filed this action for Judicial Review.

**II. STANDARD OF REVIEW.**

Final decisions rendered by PERB are reviewed by the district court under Iowa Code Chapter 17A, the Iowa Administrative Procedures Act. Iowa Code § 17A.19 (2019). The district court acts as the appellate court and may only overturn the agency’s decision “if it is erroneous under one of the grounds enumerated in the statute, and a party’s substantial rights have been prejudiced.” *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006). The standard of review depends on the type of error alleged by the Petitioner. *Jacobson Transp. Co. v. Harris*, 778 N.W.2d

192, 196 (Iowa 2010). When an agency has been “clearly vested” with a fact-finding function, the “standard of review depends on the aspect of the agency’s decision that forms the basis of judicial review.” *Burton v. Hilltop Care Center*, 813 N.W.2d 250, 256 (Iowa 2012) (quoting *Evercom Systems, Inc. v. Iowa Utilities Board*, 805 N.W.2d 758, 762 (Iowa 2011)). The standard of review depends on if the alleged error involves an issue of (1) findings of fact, (2) interpretation of law, or (3) an application of the law to facts. *Id.*

If the alleged error is one of fact, the standard of review is whether the findings are supported by substantial evidence. *Harris*, 778 N.W.2d at 196; *Schutjer v. Algona Manor Care Ctr.*, 780 N.W.2d 549, 557 (Iowa 2010). “[A] reviewing court can only disturb those factual findings if they are ‘not supported by substantial evidence in the record before the court when that record is reviewed as a whole.’” *Burton*, 813 N.W.2d at 256 (quoting Iowa Code § 17A.19(10)(f)). The Court “is limited to the findings that were actually made by the agency and not other findings the agency could have made.” *Id.* “In reviewing an agency’s findings of fact for substantial evidence, courts must engage in a ‘fairly intensive review of the record to ensure the fact finding is itself reasonable.’” *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 518 (Iowa 2012) (quoting *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 499 (Iowa 2003)).

“Evidence is substantial if a reasonable person would find the evidence adequate to reach the same conclusion.” *Grundmeyer v. Weyerhaeuser Co.*, 649 N.W.2d 744, 748 (Iowa 2002) (citing *Ehteshamfar v. UTA Engineered Sys. Div.*, 555 N.W.2d 450, 452 (Iowa 1996)). The district court is “not to determine whether the evidence supports a different finding; rather our task is to determine whether substantial evidence, viewing the record as a whole, supports the findings actually made.” *Cedar Rapids Community School District v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011) (internal citations and quotations omitted).

When the alleged error is in the Commissioner's interpretation of law, the standard of review is whether the Commissioner's interpretation was erroneous. *See Clark v. Vicorp Rests., Inc.*, 696 N.W.2d 596, 604 (Iowa 2005). When the district court is evaluating the agency's interpretation of law, the standard of review depends on if the agency was "clearly vested" with the authority to interpret the statute by the Iowa Legislature. *Meyer*, 710 N.W.2d at 256-57.

If the agency *has not* been clearly vested with the authority to interpret a provision of law, such as a statute, then the reviewing court must reverse the agency's interpretation if it is erroneous. If the agency *has* been clearly vested with the authority to interpret a statute, then a court may only disturb the interpretation if it is "irrational, illogical, or wholly unjustifiable.

*Burton v. Hilltop Care Ctr.*, 813 N.W.2d 250, 256 (Iowa 2012) (internal citations omitted) (emphasis in original). If the legislature does not expressly grant that right to the agency, then the Court must review "'the precise language of the statute, its context, the purpose of the statute, and the practical considerations involved' to determine whether the interpretation of a statute has been clearly vested in the discretion of the agency." *The Sherwin-Williams Co. v. Iowa Dep't of Revenue*, 789 N.W.2d 417, 423 (Iowa 2010) (internal citations omitted). "[E]ach case requires a careful look at the specific language the agency has interpreted as well as the specific duties and authority given to the agency with respect to enforcing particular statutes." *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 13 (Iowa 2010).

If the claimed error is in the ultimate conclusion reached, "then the challenge is to the agency's application of the law to the facts, and the question on review is whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence." *Meyer*, 710 N.W.2d at 219; Iowa Code § 17A.19(10)(i), (j).

### III. CONCLUSIONS OF LAW.

Petitioner first asserts the interpretation of law by PERB was incorrect. Therefore, the threshold determination is if PERB was vested with the authority to interpret the statute. There is no language in Iowa Code section 17A.19 clearly vesting PERB with interpretive authority. “If the legislature has not expressly granted interpretive authority to an agency, [the court] must examine the phrases or statutory provisions to be interpreted, their context, the purpose of the statute, and other practical considerations to determine whether the legislature intended to give interpretive authority to an agency.” *Abbas v. Iowa Ins. Div.*, 893 N.W.2d 879, 886 (Iowa 2017). “We are more likely to conclude the legislature clearly vested interpretive power in an agency when the agency necessarily must interpret the statutory language at issue in carrying out its duties and no relevant statutory definition applies.” *Ramirez-Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 769 (Iowa 2016). The Court finds no precedent to determine if PERB has interpretive authority. However, the Iowa Court of Appeals has found: “The Board's application of the just cause standard to the facts was clearly vested in the discretion of the agency.” *Kuhn v. Pub. Employment Relations Bd.*, No. 07-0096, 2007 WL 4191987, at \*1 (Iowa Ct. App. Nov. 29, 2007). Therefore, it is necessary for this Court to determine if PERB’s decision was “[b]ased upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency.” *Lakeside Casino v. Blue*, 743 N.W.2d 169, 173 (Iowa 2007).

Courts generally hold that “just cause” is a case-by-case analysis. See *Briggs v. Bd. of Directors of Hinton Cmty. Sch. Dist.*, 282 N.W.2d 740, 743 (Iowa 1979) (“Probably no inflexible ‘just cause’ definition we could devise would be adequate to measure the myriad of situations which may surface in future litigation.”). PERB has previously used a variety of factors to determine if “just cause” existed, such as: if there was a fair investigation, if the employee had

knowledge of the rules and expected conduct, if the reasons for the action was adequately communicated to the employee, whether there was sufficient evidence of guilt, if the progressive discipline system was followed, if the punishment was proportionate to the offense, the employee's performance and discipline record, and if they were given due consideration, and any other mitigating circumstances. *See Rode and State (Dep't of Corr.)*, No. 100041, 2015 WL 10437949, at \*5 (IA PERB 2015).

In this case, PERB and the ALJ held Carnes violated Section A-2 of the DHS Employee Handbook by acting "in an unethical manner in a way that affected and has the potential to affect DHS." Proposed Decision at 14. They further held, "Carnes acted unethically when sending inappropriate, sexually suggestive text messages and an inappropriate picture of a penis to RH. Further, Carnes abused his discretion as a State employee. Carnes used the contact information on a business card he received from RH in a professional setting." Proposed Decision at 14-15. While Carnes argued the Handbook did not apply because he did this during his off hours, the ALJ held, "I disagree with Carnes as it relates to his violation of section A-2 of the DHS Employee Handbook. That provision specifically states the general standards of conduct apply to employees' behavior 'in both personal and official activities.'" Proposed Decision at 15.

The ALJ and PERB agreed that Carnes did not violate D-1 of the handbook, because it was inapplicable to his after-work conduct. Ultimately, the ALJ and PERB found the investigators did not properly consider Carnes' work history and lack of a disciplinary record. They found that his violation occurring on one day did not warrant termination under the State's progressive discipline policy.

"Just cause" includes an analysis of the impact of the action on the employee's performance of their job, as well as the impact it has on the employer. *Board of Dirs. v. Simons*, 493 N.W.2d



879, 884 (Iowa Ct. App. 1992). There is precedent in State employment for the State to not apply the progressive discipline standard when the termination was proportionate to the act and does not justify a lower penalty. *See Paul Rode and State of Iowa (DEPARTMENT OF CORRECTIONS)*, 2015 WL 10437949, at \*1.

The nature of Carnes' communications with RH were inappropriate, and certainly, the sending of a picture of a penis to a State vendor is an egregious act. The application of the progressive discipline policy to Carnes' conduct could be considered appropriate if it was not proper to also consider the damages Carnes' actions could have on the State's relationships with its vendors. In this case, Carnes initiated contact with a State vendor using information [the State vendor's contact information] obtained during the course of his employment. While Carnes' communications with RH occurred after work hours, his actions were not in line with the guidelines of the Handbook. Further, his actions, in particular, the sending a picture of a penis, had the potential to harm the State in their relations with this vendor. It is noteworthy that this vendor took RH off of the account for her "protection" and that RH was negatively impacted by Carnes' conduct. As acknowledged by Carnes, his conduct most definitely cast a poor light upon the State.<sup>3</sup> For all of these reasons, it was both irrational and illogical for the ALJ and PERB to find Carnes' acts were not egregious enough to avoid the application of the progressive discipline standard. In this instance, it was appropriate for Glenwood and the State to not apply the progressive discipline standard. There is precedent for the progressive discipline standard to not be applied in similar situations. As such, this Court must overturn the decision of PERB and find

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<sup>3</sup> In his October 9, 2017 interview, Carnes acknowledged through his conduct he "definitely did not act like a State of Iowa employee," that he "let the State of Iowa down," that he acted "inappropriately," that he was "out of line," that his actions were "against his moral code" and "disrespectful," and that "it definitely goes against everything that [he] is as a State employee."

the decision to fire Carnes was supported by “just cause.” The decision to fire Carnes was correctly made and must be upheld.

**IT IS HEREBY ORDERED** that the Petition for Judicial Review is **GRANTED**. The case is remanded to PERB to enter a decision consistent with this Order. Costs are assessed to Respondent.



State of Iowa Courts

**Type:** OTHER ORDER

**Case Number** CVCV058737  
**Case Title** IA DEPT OF HUMAN SERVICES VS IA PUBLIC EMPLOYMENT REL BOARD

So Ordered

A handwritten signature in cursive script, reading "Samantha Gronewald".

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Samantha Gronewald, District Court Judge  
Fifth Judicial District of Iowa