

STATE OF IOWA  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

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CHAD MOSER, Appellant,	)	CASE NO. 102190
and	)	PROPOSED DECISION AND ORDER
STATE OF IOWA (DEPARTMENT OF TRANSPORTATION), Appellee.	)	

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Appellant, Chad Moser, filed this state employee grievance appeal with the Public Employment Relations Board (PERB) pursuant to Iowa Code section 8A.415(1)(b) following a third-step response by the director of the Iowa Department of Administrative Services (DAS) denying his grievance. Moser worked as a mechanic at the Department of Transportation (DOT) repair shop in Ames. Moser contends he was improperly denied an interview for a similar mechanic position with the DOT motor pool, which obstructed his right of appointment under Iowa Code section 8A.417(3).

An evidentiary hearing was held on November 27, 2018. Mr. Moser represented himself. Andrew Hayes and Alla Mintzer Zaprudsky represented the State. The parties submitted post-hearing briefs on January 4, 2019.

Based upon the entirety of the record, and having reviewed and considered the parties' briefs, I conclude Moser has not established the State failed to substantially comply with Iowa Code chapter 8A, subchapter IV or DAS rules implementing those provisions.

## FINDINGS OF FACT

Chad Moser began working for the State of Iowa, Department of Transportation on January 18, 2008, as a highway technician associate. He moved into the mechanic position after six months. At the time of the hearing and the matters at issue in this case, Moser worked as a mechanic at the repair shop in the Ames DOT complex.

In January of 2018, Moser applied for a mechanic position, Vacancy 18-00927, with DOT's motor pool in Ames. This position was posted in accordance with normal DOT policy after the DOT had gone through the pre-application requirements. Kim Van Cleave, a staffing coordinator with the DOT, and David May, the DOT manager of office support services and the hiring manager<sup>1</sup> for this vacancy, received approval of the Position Description Questionnaire (PDQ) from DAS regarding this position. Van Cleave's role as staffing coordinator is to ensure consistency in the hiring process and to ensure consistency of the practices of the hiring managers.

After receiving approval, Van Cleave and May drafted the questions used in the application forms. An applicant had to meet minimum requirements for the position. DAS evaluates whether an applicant meets the minimum requirements by evaluating the resume and the person's application for employment. The application process at issue here also required applicants to submit responses to supplemental questions. Candidates filled out the necessary application paperwork and answered nine supplemental questions

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<sup>1</sup> The hiring manager is also referred to as the "hiring authority" in DOT policy.

relating to a candidate's experience. The following five questions were used to score the candidates' applications to determine which candidates would receive an interview:

5. Describe your experience operating computers and other diagnostic equipment? What is your proficiency level? If no experience, indicate "none". Response must be clear and thorough to receive credit. Responses such as "see resume or application, etc." are not acceptable.
6. Describe the types of repairs you have made to vehicles. Please include the vehicle make and model. If no experience, indicate "none". Response must be clear and thorough to receive credit. Responses such as "see resume or application, etc." are not acceptable.
7. Describe your experience with servicing vehicles. What types of servicing have you completed? Include the make and model of the vehicles you have serviced. If no experience, indicate "none". Responses must be clear and thorough to receive credit. Responses such as "see resume or application, etc." are not acceptable.
8. Describe your experience and knowledge with electronics and electrical work. If no experience, indicate "none". Responses must be clear and thorough to receive credit. Responses such as "see resume or application, etc." are not acceptable.
9. Describe your experience operating snow removal equipment including snow blowers and snow plows. If no experience, indicate "none". Responses must be clear and thorough to receive credit. Responses such as "see resume or application, etc." are not acceptable.

May and Van Cleave created a scoring rubric to evaluate the candidates' answers to these questions and assigned point values (0-5) to each answer. Generally, the candidate's answer would receive fewer points for less experience or short answers and more points for extensive experience. May and Van Cleave used the overall score received by each candidate to determine whom to interview. A candidate could receive a maximum score of 25 based on

the questions on the form, but a candidate could receive five additional points if the candidate qualified for veteran's preference points.

DOT policy allows a preference for veterans by assigning additional points during the application evaluation process. Whether a candidate qualifies to receive veteran's preference points is determined by DAS and the applicant would submit documentation in order to receive the additional points.

Twelve candidates applied for the position. Van Cleave and May reviewed the responses to the supplemental questions for all the applicants. May and Van Cleave reviewed the responses together and mutually determined the appropriate score for each response. May served as the subject matter expert during the review and scoring process. The questions required the applicants to list experience with equipment and to identify that equipment. Van Cleave was unfamiliar with some of the types of equipment and vehicles mentioned by the responses as she is not as familiar with mechanic skills as May. When she did not understand a response, May explained it. Van Cleave specifically remembered May explaining that one of the responses mentioned a type of equipment that was newer technology. Therefore, she and May awarded that response a higher score. Answers that were vague, such as stating the person had worked on too much to list, were given a lower score as those responses could not be evaluated. A facial review of the supplemental responses and the scores for those responses indicates May and Van Cleave followed their scoring rubric.

May and Van Cleave tried to be as fair and consistent as possible when evaluating these responses. Although they did have access to the applicant's names while reviewing the candidate's responses to the supplemental questions, May and Van Cleave did not use anything other than the applicant's responses to score the candidate's application. Van Cleave and May then used the candidate's overall score to determine which applicants would receive an interview.

May and Van Cleave believed scoring based only on a person's responses to the questions would allow all applicants an equal opportunity for the position, rather than possibly relying on knowledge of a particular applicant or where the applicant currently worked. May specifically denies colluding with Moser's current supervisor, Reese Polich, to deny Moser an interview.

Of the twelve applicants, five received an invitation for an interview. The applicants interviewed received a score of 14 or higher. Of those selected for an interview, two received five veteran's preference points. Moser received a score of 9 based on his responses to the supplemental questions. Two others also received a score of 9 for their responses. There were two applicants who received a score greater than Moser that still did not receive an invitation to interview. In reviewing the scoring prior to the hearing, neither May nor Van Cleave believed they would reach a different result in the scoring.

Moser learned the DOT had begun the interview process for the mechanic vacancy through colleagues that had received invitations to

interview. May confirmed that other employees in the same repair shop as Moser were interviewed for this position.

On January 25, Moser contacted Van Cleave to ask about the vacancy. Van Cleave told him the DOT was in the early stages of the hiring process and he was not going to be interviewed at that time. Moser later received an email from DAS telling him the position was filled.

Moser filed a grievance on February 23, 2018, claiming he was denied an interview for the vacant mechanic position. He discussed the grievance with May and his supervisor, Polich on March 1, 2018. The grievance was answered on March 9, 2018. Moser appealed. DAS issued the Step 3 response on April 27, 2018.

Moser claims May and Polich colluded against him to deny him an interview for the mechanic position as Polich wanted to keep him in his current position. Moser also contends the assignment of veteran's preference points is discriminatory. Moser alleges the State did not substantially comply with Iowa Code section 8A.417(3), which states, in part: "An employee of the department or any other person shall not defeat, deceive, or obstruct any person in the person's right to examination or appointment under this subchapter."

The State asserts it substantially complied with Iowa Code section 8A.417(3) in the application and hiring process for the mechanic position with the DOT. The State maintains Moser was given the same opportunity to apply as the other applicants, and there is no proof that management was prejudiced, either consciously or subconsciously, in scoring Moser's response

to the supplemental questions. The State contends Moser's argument regarding veteran's preference points is irrelevant as Moser would not have received an interview for the mechanic position regardless of whether veteran's preference points were awarded.

## CONCLUSIONS OF LAW

Moser filed this appeal pursuant to Iowa Code section 8A.415(1), which states, in part:

### 1. *Grievances*

*a.* An employee except an employee covered by a collective bargaining agreement which provides otherwise, who has exhausted the available agency steps in the uniform grievance procedure provided for in the department rules may, within seven calendar days following the date a decision was received or should have been received at the second step of the grievance procedure, file the grievance at the third step with the director. The director shall respond within thirty days following receipt of the third step grievance.

*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. The hearing shall be conducted in accordance with the rules of the public employment relations board and the Iowa administrative procedure Act, chapter 17A. Decisions rendered shall be based upon a standard of substantial compliance with this subchapter and the rules of the department. Decisions by the public employment relations board constitute final agency action.

Pursuant to Iowa Code section 8A.415(1), PERB's decision "shall be based upon a standard of substantial compliance with this subchapter [subchapter IV of chapter 8A] and the rules of the department [of administrative services]." For an employee to prevail in a grievance appeal before PERB under this statutory standard, the employee must establish the

State failed to substantially comply with Iowa Code chapter 8A subchapter IV or department of administrative services (DAS) rules. *Stratton and State (Dep't of Human Servs.)*, 93-MA-13 at 8 (citing a previous version of the statute). Under this statutory framework, the grievant, in this case Moser, bears the burden to establish the State failed to substantially comply with the cited statute or rule. *Studer and State (Dep't of Human Servs.)*, 98-MA-12 at 9.

Substantial compliance is undefined by Iowa Code chapter 8A. However, PERB has generally defined the standard for “substantial compliance” as:

[A]ctual compliance in respect to the substance essential to every reasonable objective of the statute. It means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted. Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.

*Brooks and State of Iowa (Dep't of Education)*, 15-MA-01 at 7 (further citations omitted).

Moser alleges the State failed to substantially comply with Iowa Code section 8A.417(3), which states, in part “An employee of the department or any other person shall not defeat, deceive, or obstruct any person in the person’s right to examination or appointment under this subchapter.” Moser argues May consciously or subconsciously scored Moser’s answers lower so he would not receive an interview. Moser also argues that May colluded with Polich to deny Moser an interview. Finally, Moser contends that the use of veteran’s preference points demonstrates a failure to comply with the cited statute.

### General Application Process

The State and specifically the DOT followed their general internal application guidelines in filling Vacancy 18-00927, the mechanic position. Van Cleave, the staffing coordinator, worked with May throughout the process to ensure the application process was consistent with other DOT application processes. Moser acknowledged he was able to apply like all the other applicants. Moser's application was considered and scored.

The crux of Moser's trouble with the application process seems to be the process the DOT used for scoring the applications. After DAS determined the applicants met minimum requirements, the DOT, in this case Van Cleave and May, considered the applications to determine which candidates to interview. Van Cleave and May decided to score the applicants using the candidate's responses to five of the nine supplemental questions. May and Van Cleave developed a rubric to score each of the answers. They worked together to score each answer. They used only the responses given to score the question rather than also relying on an applicant's resume or other application materials. May and Van Cleave found this format preferable because it would prevent them from giving some applicants an advantage. If May knew an applicant or knew the applicant worked at the DOT, he might assume those applicants had certain experience or qualifications. May and Van Cleave determined that it would create greater fairness and consistency in scoring the applications if they used only the applicant's answers to the supplemental questions.

The supplemental questions also specifically provided that responses to the supplemental questions “must be clear and thorough to receive credit.” The form further added that responses referring to a person’s resume or application were not acceptable. The supplemental question form was clear and did not mislead or deceive applicants about the requirements for filling out the application.

The DOT’s process for considering applications for the mechanic position, Vacancy 18-00927, seems logical. The process also attempts to prevent preferential treatment. However, it may result in less qualified applicants receiving interviews because those applicants demonstrated their qualifications by answering the questions specifically and with detail. This process also may result in more qualified applicants being denied interviews due to the applicant’s failure to convey their qualifications and credentials by failing to completely and thoroughly answer each of the supplemental questions. Although this seeming unfairness may occur, it is not the result of the State and its employees’ actions to defeat, deceive, or obstruct an applicant’s right to an interview. The applicant’s failure to follow the instructions of the application and fully explain the person’s credentials and qualifications in the supplemental responses would result in that applicant’s failure to receive an interview.

Specifically in Moser’s case, he has experience with the DOT as a mechanic. He may have been more qualified than some of the candidates that were interviewed. However, if his responses to the questions did not highlight

his qualifications to the same extent as the other applicants, he would not receive an interview. That result may seem unfair; however, the State followed its process in evaluating the applications received and granted interviews based on the qualifications of the candidates as expressed in the applicant's responses to the supplemental questions. *See generally, Brooks and State of Iowa (Dep't of Education)*, 15-MA-01, at 7, 11. (citing *Fulton v. State*, 10-MA-03 at 8 (PERB 2011)) (stating PERB does not have the authority to evaluate the effectiveness or fairness of a rule, but instead PERB's authority is limited to determining whether the State substantially complied with the rule as written).

The State followed its procedure in reviewing only the applicant's supplemental responses so as not to give known applicants an unfair advantage. Further, the DOT's method prevented giving preferential treatment based on knowledge of the applicant or where that applicant currently works or has worked. Making determinations on how to evaluate someone's qualifications is a complex decision. The State attempted to find a consistent and logical scoring process that would result in interviewing and hiring a qualified candidate. To earn the right to an interview, the State required the candidate to demonstrate his or her qualifications in the supplemental responses. Moser has not shown the process May and Van Cleave used to evaluate the applications defeats, deceives, or obstructs his right or anyone else's right to an examination or appointment.

*Alleged Collusion or Prejudice in Application Scoring*

Moser also alleges May either consciously or subconsciously worked to “defeat, deceive, or obstruct” his right to an interview by giving Moser’s responses low scores. Nothing in the record indicates that May consciously or subconsciously scored Moser’s responses lower than was appropriate. May served as the subject matter expert and Van Cleave deferred to his judgment so May had more input on the scoring. However, May and Van Cleave worked together on the scoring. They did not separately score the responses and then discuss it. Although May was the subject matter expert, he explained his rationale for scoring the response to Van Cleave. Van Cleave assisted in the scoring, monitored the process, and provided consistency throughout the process, which was her role.

The State did not use blind grading during the scoring of the responses. Nonetheless, the record contains no evidence that the choice not to use blind grading resulted in Moser’s scores being lowered. Facially, the record does not indicate any inconsistency in the scoring of Moser’s responses or of other applicant’s responses. The testimony concerning the method for evaluating the responses corroborates that finding. Van Cleave’s involvement in the scoring process was designed to prevent May from consciously or subconsciously scoring an applicant’s responses inappropriately.

I find May’s statement that he did not collude with Polich to prevent Moser from receiving an interview credible. May gave a consistent, logical, and detailed explanation of the scoring method and the reason for certain scores.

Additionally, Van Cleave's testimony concerning the process and the pivotal role she played corroborates his testimony.

There is no evidence in the record to indicate May colluded with Polich, or that he individually consciously or subconsciously awarded Moser fewer points than was appropriate for his responses. As such, Moser has failed to demonstrate the State's lack of substantial compliance with Iowa Code section 8A.417(3).

*Veteran's Preference Points*

Moser argues the State defeated or obstructed his right to an interview for the mechanic position because the application process involved the utilization of veteran's preference points. Moser claims the State discriminated against him because he is not a veteran. Of the 12 applicants for the mechanic position, two of the applicants received veteran's preference points and both were interviewed. Had those applicants not received veteran's preference points, Moser still likely would not have received an interview. The DOT interviewed the five candidates that received the highest scores. Even subtracting the veteran's preference points from the other candidates scores, Moser's score would not have been in the top five. He had the seventh highest score after removing the veteran's preference points from the other applicants' scores. Moser has not shown the utilization of veteran's preference points defeated or obstructed his right to an interview.

Further, the DOT is statutorily required to give preference to veterans in appointment and employment over other similarly qualified applicants. See

Iowa Code § 35C.1.<sup>2</sup> The DOT and DAS simply followed the departments' policies and awarded veteran's preference points to attempt to fulfill the statutory requirement. The DOT, DAS, and their employees did not defeat or obstruct a person's right to examination or appointment by following this policy. Moser has not demonstrated that DOT, DAS, or its employees failed to substantially comply with Iowa Code section 8A.417(3).

I consequently propose the following:

ORDER

Moser's state employee grievance appeal is DISMISSED.

The costs of reporting and of the agency-requested transcript in the amount of \$391.20 are assessed against the Appellant, Chad Moser, pursuant to Iowa Code section 20.6(6) and PERB rule 621—11.9. A bill of costs will be issued to the Appellant in accordance with PERB subrule 621—11.9(3).

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

DATED at Des Moines, Iowa this 8th day of March 2019.

/s/ Amber DeSmet

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<sup>2</sup> Iowa Code section 35C.1 states in part "In every public department and upon all public works in the state . . . veterans who are citizens and residents of the United States are entitled to preference in appointment and employment over other applicants of no greater qualifications."

Administrative Law Judge

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