STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

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PUBLIC EMPLOYMENT RELATIONS BOARD

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| CARL BESSMAN, ET AL., Complainants, and STATE OF IOWA (DEPARTMENT OF PUBLIC SAFETY, DEPARTMENT OF PERSONNEL, DEPARTMENT OF MANAGEMENT), Respondent. | ) | CASE NO. 93-MA-17 |
| CARL BESSMAN, Complainant, and STATE OF IOWA (DEPARTMENT OF PUBLIC SAFETY, DEPARTMENT OF PERSONNEL), Respondent. | ) | CASE NO. 94-MA-10 |

RULINGS ON MOTIONS TO DISMISS

Charles E. Boldt, Administrative Law Judge (ALJ). On January 13, 1993, a "State Employee Grievance and Disciplinary Action Appeal" form was filed on behalf of eleven employees[1] of the Iowa Department of Public Safety. Appellants were in the job classifications of Criminalist I(2) and Criminalist II(9). The appeal was filed pursuant to §19A.14(1), Code of Iowa (1991)[2] with the Public Employment Relations Board (PERB) against the State of Iowa [Department of Public Safety (DPS), Department of Personnel

[1]Alphabetically, the employees are: Carl Bessman, Kelli Bodwell, Barry Cushman, Eugene Czarnecki, Douglas Elrick, Karl Franzenburg, Deborah Hewitt, Rebecca Maffett, Terry Rowe, Marie Sides, Michael Tate. Individual employees will be identified by last name. Collectively they will be identified as Appellants.

[2]Code references in Case No. 93-MA-17 will reference Code of Iowa (1991). Code references in Case No. 94-MA-10 will reference Code of Iowa (1993).

(IDOP), and Department of Management (DOM) (collectively as State)]. This appeal, Case No. 93-MA-17, alleged violation by IDOP of §19A.14(1) for failure to respond to Step 3 of grievances of the Appellants which had been consolidated at that step. The appeal also alleged that DOM violated IDOP rules, 581 I.A.C., by not allowing reclassifications. In attached documentation, Appellants identified subrules 3.6(3) and 4.5(2)(a) as the IDOP rules violated. The appeal also alleged violation of sections of a Managers and Supervisors Manual, breach of a verbal contract, and discrimination by the State for failing to grant reclassification of their positions to the next higher classification in the Criminalist job classification series.[3] Appellants also appealed from an alleged late Step 3 response from a designee of the Director of IDOP.

On January 29, 1993, the State filed a motion to dismiss the appeal. The State asserted that PERB is without jurisdiction to hear matters concerning classifications, PERB is without jurisdiction to hear claims of discrimination based on non-affiliation with a union, and PERB is without jurisdiction to enforce an alleged verbal contract.

On February 9, 1993, Appellants filed a motion to address resisting the State's motion to dismiss. Appellants asserted PERB's jurisdiction to hear merit appeals in §20.1 of the Code. Appellants also reiterate their alleged violation of §19A.14(1).

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[3]At the time of this filing, the Criminalist series consisted of Criminalist I, II, and III.

Appellants' motion claims violation of §19A.9 of the Code and subrules 10.3(3, 4, and 5) of IDOP rules. Appellants sought review of these rules to determine compliance by the State.

On March 25, 1993, Case No. 93-MA-17 was put on "hold" at the request of the Appellants and without objection from the State. On August 20, 1993, the Appellants continued their request to have the appeal maintained on "hold" through February, 1994.

On September 27, 1993, Carl Bessman (Bessman) filed a "State Employee Grievance and Disciplinary Action Appeal" form with PERB pursuant to §19A.14(1) of the Code. This appeal, Case No. 94-MA-10, was filed against a Step 3 response from a designee of the Director of IDOP. The appeal alleged violation of §19A.9 of the Code for implementation of changes to the classification plan. The appeal sought remedy pursuant to IDOP subrules 4.5(1)(b)(4), 4.5(8)(e)(4) and 4.9(1). The appeal alleged arbitrary and discriminatory use of discretionary authority granted by statute. The appeal made only a general reference to violation of IDOP rules. The appeal indicated that it was an "outgrowth" from Case No. 93-MA-17.

On October 20, 1993, the State filed a motion to dismiss the appeal in Case No. 94-MA-10. The State's motion asserted that the Criminalist series was merged into a single classification on April 23, 1993. The motion alleged that Bessman had failed to state a claim within PERB's jurisdiction. The motion asserted that PERB is without jurisdiction to hear classification issues. The motion also asserted that the IDOP rules under which Bessman sought remedy

provide full discretion to the Director of IDOP and do not constitute a claim upon which relief may be granted.

On October 28, 1993, Bessman filed a petition to address in which he: referenced the merger of the Criminalist series into a single classification on April 23, 1993; denied alleging that the classification plan changes were unfair and discriminatory; reiterated the claim that the implementation of the changes was inequitable and arbitrary; contended the State violated §19A.9(1) of the Code; denied he is seeking classification review; reiterated that his citation of IDOP rules was for identification of possible remedy and not violation; referenced a letter detailing the classification plan changes which is not a part of PERB's case file; and, asserted that the heart of the appeal is:

> Those employees who are most qualified and have been waiting for reclassifications the longest are being penalized by the system, when in fact the means to rectify the problem already exists in the Iowa Administrative Code.

These cases were consolidated by this ALJ for hearing of oral arguments on the motions. The hearing was conducted before me on August 23, 1994, in Des Moines, Iowa. At hearing, the State was represented by Kristin Johnson in Case No. 93-MA-17 and Jenifer Weeks-Karns in Case No. 94-MA-10. Appellants in both cases were represented by Carl Bessman. All parties had full opportunity to present arguments in support of their respective positions. No post-hearing briefs were filed.

Based on the entire record in these matters, I hereby make the following findings of fact and conclusions of law:

## FINDINGS OF FACT

Case No. 93-MA-17

The Appellants, at all times relevant hereto, were employed by DPS in the general job classification of Criminalist. Prior to April 23, 1993, this general classification was a progressive series of Criminalist I, II, and III. Appellants were in the classifications of Criminalist I and Criminalist II. Employees normally progressed through the series to Criminalist III at eighteen-month intervals. Progression was based on acquired knowledge and experience. As employees progressed through the series, more complex cases would be assigned.

In July, 1992, DOM stopped approving advancement in job series, known as position reallocation or position reclassification. The action by DOM had the effect of "freezing" employees in their current classifications.

Before and during the freeze, the Appellants continued their acquisition of knowledge and experience. DPS continued the progression of assignment of cases of increasing complexity. It was undisputed that the Appellants were working at the level of Criminalist III while remaining frozen in their job classifications of Criminalist I's and Criminalist II's.

The State has a system whereby state employees may appeal their classification assignment and seek reclassification under IDOP rules, Chapter 3. The IDOP rules applicable to Case No. 93-MA-17 are those which were in effect when Appellants filed their

appeal. IDOP rule 3.5 governs classification appeal hearings as follows:

> **3.5(19A) Classification appeal hearings.**
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> **3.5(1)** If, following a position classification review request, a decision is not issued within the time limits provided for in these rules, or the appointing authority or the incumbent does not agree with the final position classification decision, the appointing authority or the incumbent may request a classification appeal committee hearing. The request shall be in writing and shall be mailed to: Chair, Classification Appeal Committee, Iowa Department of Personnel, Grimes State Office Building, East 14th Street at Grand Avenue, Des Moines, Iowa 50319-0150. The classification appeal hearing process is a contested case as defined by Iowa Code Chapter 17A.
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> **3.5(2)** The classification appeal committee shall be appointed by the director. The committee shall consist of three persons whose professional background is in human resources management or an area of technical expertise peculiar to the subject matter of the appeal.
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> **3.5(3)** A request for a classification appeal committee hearing must be in writing, state the reasons for the request and the job classification requested. The request must be received in the department within 14 calendar days following the date the final position classification decision was issued or should have been issued.
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> **3.5(4)** The classification appeal committee hearing shall be scheduled within 30 calendar days following receipt of the request for a hearing unless otherwise mutually agreed to in writing and signed by the parties. The hearing shall be held at the Grimes State Office Building during the regular business hours of the department. The committee shall affirm or deny the job classification requested, or remand the request to the director for further review as provided for in rule 581--3.4(19A). The committee's decision shall be issued within 30 calendar days following the close of the hearing and the receipt of any posthearing submissions. Further appeal shall be in accordance with this rule.
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> **3.5(5)** Decisions of the committee shall be final unless the appellant petitions the commission to review the hearing record. The petition must be in writing, submitted by registered mail to: Iowa Personnel Commission, Iowa Department of Personnel, Grimes State Office Building, East 14th Street at Grand Avenue, Des Moines, Iowa 50319-0150, and postmarked within 30 calendar days following the date the classification appeal committee's decision was issued. The commission shall have the discretion to grant or deny the request for review. The appellant shall be notified of the decision to grant or deny the review within 30 calendar days following receipt of the petition by the commission.
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> If the appellant's request is granted, the commission's review shall be solely on the hearing record. The hearing record shall consist of a transcript of the classification appeal hearing proceeding and information prescribed by Iowa Code section 17A.12(6). The commission's decision authority shall be to sustain the classification appeal committee's decision or remand it to the director for further review as provided for in rule 581--3.4(19A). The commission's decision shall be made at its next regularly scheduled meeting following the commission's notification to the appellant.
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> If remanded, copies of the director's decision shall be sent to the commissioners, as well as to the appointing authority and the incumbent. Further appeal shall be in accordance with rule 581--3.4(19A).
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> **3.5(6)** Judicial review of final commission decisions shall be in accordance with Iowa Code section 17A.19.
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> **3.5(7)** Following a decision by the director, the classification appeal committee, or the commission, any subsequent request for review of the same position must be accompanied by a showing of substantive changes from the position description questionnaire upon which the previous decision was based. A new position description questionnaire must be prepared and all new duties must be identified as such on the new questionnaire.

Appellants sought reclassification through this process. Appellants asserted that the classification appeal committee (CAC)

would not accept their request for a hearing during the period of the freeze. Appellants also maintained that no hearing was conducted and no decision was issued. The State did not contest these assertions. There is no documentation in PERB's case file relating to the request or its refusal.

Appellants filed grievances under the uniform grievance procedure for non-contract state employees on November 23, 1992. The grievance requested "reclassification from Criminalist 1 or 2 (as the case may be), to Criminalist 2 or 3 (as the case may be), with the appropriate pay increases and retroactive back pay with the original eligibility dates for future reclassification or step increases."

The grievances filed by Appellants asserted that the State: (1) did not live up to a verbal contract to provide automatic reclassification within the Criminalist series; (2) did not inform the Appellants at pre-hiring interviews of rules, regulations or policies regarding reclassifications, advancements, or merit increases; and, (3) did discriminate against the Appellants on the basis of Appellants' non-affiliation with a union.

The Step 1 respondent, Michael Rehberg (Rehberg), answered the grievances on November 25, 1992. In his response, Rehberg agreed with Appellants' position, requested implementation of the requested reallocations, and forwarded the grievances to the next level.

The Step 2 respondent, D. E. Chapman (Chapman), received the grievances on November 25, 1992, and answered them the same day.

In his response, Chapman agreed with Appellants, cited a lack of definitive response to the reclassification issue, and identified his intent to forward the grievances to the Commissioner's office.

There is no evidence in the record when the grievances were filed at IDOP. On December 7, 1992, Chris Gaffney-Peden (Gaffney-Peden) wrote one of the Appellants indicating her assignment as the State's representative in the Appellants' grievances. She also referenced memos from September, 1991 and December, 1991 to department directors regarding reclassification. These memos are not part of PERB's case file.

On January 4, 1993, Gaffney-Peden responded at Step 3 to Appellants' grievances. She denied any violation of IDOP rules. The instant appeal in Case No. 93-MA-17 and subsequent pleadings followed.

Case No. 94-MA-10

On April 23, 1993, the Criminalist series was consolidated into a single job classification, Criminalist. This modification of the job classification plan was accomplished with the approval of DPS and IDOP. The State elected to phase in classification changes for the Appellants. The selected method for phase-in was use of employee eligibility dates. It is not clear from the record when this phased-in classification implementation was initiated. DPS was allowed to determine an element of retroactivity and decided that, as Appellants' eligibility dates arrived, each employee would be placed in the new pay range as though the freeze had not taken place.

The use of eligibility dates caused Bessman, who had a January eligibility date, to be the last to receive his placement according to the plan developed by IDOP and DPS. Several other Appellants with less experience in employment with DPS received their placements before Bessman received his. This advancement in pay of a less senior employee above a more senior employee is known as "leapfrogging."

Bessman presumably filed a non-contract employee grievance and processed it through Steps 1, 2 and 3. No grievance documentation is part of PERB's case file. The appeal and subsequent pleadings followed.

## CONCLUSIONS OF LAW

Case No. 93-MA-17

The issues in this case are: (1) Does PERB have subject matter jurisdiction to hear this appeal on classification? (2) Does PERB have subject matter jurisdiction over enforcement of an alleged verbal contract? (3) Does PERB have subject matter jurisdiction to hear matters of alleged discrimination for non-affiliation with a union? (4) Will the State be prejudiced if Appellants are allowed to allege violation of IDOP rules which were not part of the original grievances or appeal? (5) Should reallocation to higher classifications in the Criminalist series have been automatic? (6) Were Appellants prejudiced by the State's failure to respond to Step 3 of the grievance within 30 days of appeal to Step 3? (7) Has this appeal been rendered moot by changes in the classification plan?

PERB derives its jurisdiction in merit grievance appeal cases from §19A.14(1) of the Code, which states:

> 1. *Grievances.* 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 of personnel 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 calendar days following receipt of the third step grievance.
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> 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. Decisions rendered shall be based upon a standard of substantial compliance with this chapter and the rules of the department of personnel. Decisions by the public employment relations board constitute final agency action.
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> For purposes of this subsection, "*uniform grievance procedure*" does not include procedures for discipline and discharge.

The State and Appellants argued several matters relevant to the merits of this case in support of their respective positions. This ALJ, cognizant of classification plan changes subsequent to the filing of this appeal and with tacit acquiescence from both parties, accepted the arguments into the record and incorporates these arguments into the reasoning leading to this ruling.

Jurisdiction regarding classifications.

The State argued that PERB lacks subject matter jurisdiction on any case which involves reclassification. The State maintained that there is a special classification appeal process which provides separate review and separate appeal procedures to address concerns raised by Appellants. In support of this contention, the State cited a case which is pending before the Iowa Supreme Court.[4]

The Appellants argued that Allen is distinguishable from this appeal in two respects. First, the appellants in Allen had their grievances denied at Steps 1 and 2 of the uniform grievance

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[4]Allen, Teepe, et al., 92-MA-29

procedure; whereas, the Appellants viewed the responses to their own grievances as having sustained the grievances. Second, the appellants in Allen were accorded a hearing before the CAC; whereas, the Appellants in the instant case never got a hearing. Appellants asserted that the CAC was not accepting written requests for classification review, holding hearings, issuing decisions, or taking any action on requests. The Appellants maintained that this inaction by the CAC left them without recourse to have their concerns addressed.

In a motion to dismiss, the allegations made by the complaining party are taken as true and construed in the light most favorable to them.[5] The primary contention made by the Appellants is that DOM violated IDOP rules by not allowing reclassification of their positions. There is a nexus between this contention and the presumed-to-be-true assertion that the CAC ceased to perform its due process function during the period of the freeze imposed by DOM's refusal to allocate funds for position reclassification.

DOM can exert control over reallocation pursuant to §19A.9(1), which states:

> **19A.9 Rules adopted.**
> The personnel commission shall adopt and may amend rules for the administration and implementation of this chapter in accordance with chapter 17A. The director shall prepare and submit proposed rules to the commission. Rulemaking shall be carried out with due regard to the terms of collective bargaining agreements. A rule shall not supersede a provision of a collective bargaining agreement negotiated under chapter 20. The rules shall provide:
> 1. For the preparation, maintenance, and revision of a position classification plan from a schedule by separate department for each position and type of employment not otherwise provided for by law in state government for all positions in the executive branch, excluding positions under the state board of regents, based upon duties performed and responsibilities assumed, so that the same qualifications may reasonably be required for and

[5] Clark v. Mincks, 364 N.W.2d 226, 228 (Iowa 1985)

> the same schedule of pay may be equitably applied to all positions in the same class, in the same geographical area. After the classification has been approved by the commission, the director shall allocate the position of every employee in the executive branch, excluding employees of the state board of regents, to one of the classes in the plan. Any employee or agency officials affected by the allocation of a position to a class shall, after filing with the director a written request for reconsideration in the manner and form the director prescribes, be given a reasonable opportunity to be heard by the director. An appeal may be made to the commission or to a qualified classification committee appointed by the commission. An allocation or reallocation of a position by the director to a different classification shall not become effective if the allocation or reallocation may result in the expenditure of funds in excess of the total amount budgeted for the department of the appointing authority until approval has been obtained from the director of the department of management.
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> When the public interest requires a diminution or increase of employees in any position or type of employment not otherwise provided by law, or the creation or abolishment of any position or type of employment, the governor, acting in good faith, shall so notify the commission. Thereafter the position or type of employment shall stand abolished or created and the number of employees therein reduced or increased. Schedules of positions and types of employment not otherwise provided for by law shall be reviewed at least once each year by the governor.

While DOM can prevent reclassification decisions from becoming effective, this ALJ finds no authority in statute or IDOP rule which grants DOM the ability to prevent the CAC from hearing requests for reclassification. Thus, the CAC may have been in violation of IDOP rules when it refused to hear the Appellants' request for reclassification. When a division of State government is alleged to be in violation of IDOP rules, the issue is within PERB's jurisdiction and is justiciable.

Jurisdiction regarding verbal contracts

The State argued that PERB lacks jurisdiction over an alleged breach of a verbal contract raised by Appellants. The State asserted that such an allegation is a common law claim whereas PERB's jurisdiction is limited to alleged violations of Chapter 19A of the Code or IDOP rules. The State cited a previous merit appeal case[6] in support of its contention.

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[6]George B. Ide, 93-MA-14

The Appellants maintained that Ide is not applicable to this case because the Appellants alleged a failure by the State for working them out of classification. The Appellants alleged that all of the Appellants were performing work at the Criminalist III level.

Appellants alleged in their appeal that the "State of Iowa has not lived up to the verbal contract that was given at the time of interviews that the reclassification process was an automatic formality, and is in fact, 'customary practice' as listed in the Personnel Manual, Chapter 3." The State's assertion that PERB lacks jurisdiction over verbal contracts addressed this claim by Appellants.

PERB's jurisdiction in merit appeals under §19A.14(1) is limited to alleged violation of Chapter 19A or IDOP rules. Neither provides for PERB jurisdiction over verbal contracts. PERB is without subject matter jurisdiction over Appellants' claim that the State did not abide by a verbal contract at the time of hiring interviews of the Appellants.

Jurisdiction regarding discrimination for non-affiliation with a union.

The State maintained that PERB is without jurisdiction on the Appellants' allegation of discrimination based on non-affiliation with a union. The State claimed that this issue has been found by PERB to not constitute a recognizable cause of action before PERB.

The State cited a ruling on motions from another merit appeal[7] in support of its assertion.

The Appellants contend that contract-covered State employees received automatic pay increases while non-contract employees were frozen. The Appellants argued that there is a fairness issue when contract employees and non-contract employees are treated differently. The Appellants advanced this theory as evidence of discrimination based on non-affiliation with a union.

The Appellants have not alleged discrimination based on political or religious opinions or affiliations or race or national origin or sex or age as is set out in §19A.18. Furthermore, §19A.9 provides that rulemaking shall not supersede provisions of a collective bargaining agreement. The action claimed by Appellants as discriminatory is not covered by Chapter 19A or IDOP rules. It is recognized that differences may occur between types of employees through the different contracts negotiated between the State and the unions representing State employees under the different contracts. Similarly, non-contract employees may be treated differently than employees governed by contracts. The State does not violate substantial compliance with Chapter 19A or IDOP rules as it bargains with its different unions and develops rules to cover non-contract employees. The State is not required to grant non-contract employees identical benefits to contract employees. The Appellants have failed to identify a matter over which PERB has jurisdiction with this claim.

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[7] Anderson, et al., 93-MA-15

Additional citation of alleged violations.

The State rebutted the Appellants' contention in their motion to address that the State committed violation of IDOP rules under rule 10.3 which deals with temporary assignments. This matter was not addressed in previous grievance filings or on appeal. The State asserted that it would be prejudicial to the State if the additional allegations were allowed. The State argued that there are no new facts, only a new theory by which Appellants seek to expand their appeal. The State also maintained that these allegations could have been advanced prior to Appellants' motion to address.

The Appellants argued that their citation of additional rule violations in their motion to address should be allowed because the alleged violations were not discovered until there was an attempt to mediate a settlement of this case. Appellants asserted relevance in that there was a longstanding pay disparity in the Criminalist series since Criminalists were receiving Criminalist I and Criminalist II pay for Criminalist III work.

The rules cited by the Appellants provide that additional pay may be requested by the appointing authority when extraordinary duties are temporarily assigned that are of a level higher than the duties assigned to the class to which the employee is allocated. It was undisputed that the Appellants were working outside their allocated classification; however, the assignment of higher level duties was permanent and the vehicle chosen to rectify this inequity was reclassification to a higher pay grade. Extraordinary

duty pay has not been properly grieved and allowance to expand the instant appeal into this new area is denied.

Automatic reallocation.

The State argued that reallocation through the Criminalist series was not automatic because subrule 4.5(2)(a) specifically states that reallocation will not be automatic except for trainee assignments or as provided for in collective bargaining agreements. The State contended that the definition of a trainee assignment in subrule 4.5(1)(f) does not fit the position of Criminalist I or Criminalist II. Furthermore, the State suggested that, if IDOP rules governing automatic reallocations is deemed applicable, there is still no rule violation because subrule 4.5(2)(a) does not provide for retroactivity if the reallocation is withheld.

Subrules 4.5(1)(f) and 4.5(2)(a) respectively state:

> f. Pay for trainee appointments. The director may authorize appointment below the entrance rate of pay for a class of trainee appointments to positions covered by merit system provisions. When trainee appointments are made in accordance with these rules, the rate of pay shall be set one step or 5 percent below the entrance rate for the class for each semester (or equivalent) of training the employee lacks in meeting the minimum training requirements for the class to which the appointment is made. Pay increases shall be automatic and coincide with the successful completion of each semester of additional training. As soon as the training needed to meet the established minimum qualifications has been completed, the trainee shall be appointed in accordance with these rules or terminated.
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> * * *
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> a. Pay increases shall not be automatic, except where provided for in collective bargaining agreements and for trainee appointments, nor retroactive if an increase is withheld, nor in advance of the pay increase eligibility date. Pay increases may be delayed beyond the eligibility date.

The Appellants argued that their reclassifications with appropriate pay increases should have been automatic since the Criminalist I and Criminalist II positions were trainee positions preparatory for the journeyman class of Criminalist III.

The Appellants' argument is without any supporting documentation in the record. If Appellants' contention was to be assumed to be correct, all lower levels in classification series would be considered trainee appointments to higher levels within the series. This is simply not the case. This ALJ cannot conclude that the Criminalist I and Criminalist II job classifications were trainee appointments within the meaning of IDOP subrule 4.5(1)(f) nor that reclassification within the series should have been automatic.

Late answer at Step 3.

The State argued that there was no prejudice to Appellants as a result of a late response at Step 3 of the Appellants' grievances. The State maintained that §19A.14(1) contemplates a possible lack of response and allows grievants to appeal after the response should have been received; therefore, failure to answer or failure to answer within thirty days of the grievance appeal to the Director of IDOP does not constitute a violation of Chapter 19A of the Code or IDOP rules since due process is not thwarted.

The Appellants contended that the response from Gaffney-Peden was thirty-five days after appeal to Step 3 of the uniform grievance procedure. Appellant Czarnecki argued that the Appellants construed the failure to respond in thirty days at Step 3 as a tacit admission by the State that the grievances were correct in their allegations. Czarnecki indicated that the Appellants viewed IDOP's failure to respond as a default judgment in their favor.

The State's response simply denied that IDOP rules had been violated. The response provided no discussion or rationale, but it did identify Appellants' appeal rights. The response was issued prior to Appellants' filing of appeal to PERB. This ALJ cannot conclude that Appellants were prejudiced by this alleged failure to respond at Step 3 of the grievance procedure within thirty days of the grievances' appeal to Step 3.

Mootness.

The State argued that this case has been rendered moot by the consolidation of the Criminalist series into a single Criminalist class in April, 1993. The State contended that the requested remedy of allowing reclassification to proceed is no longer applicable and retroactive pay never was available under IDOP rules.

The Appellants' only argument against this contention was a reiterated request for retroactive pay.

The Iowa Supreme Court has said:

> The courts of this state may properly consider moot questions when they are of great public importance and are likely to recur.[8]

The Appellants are no longer seeking reclassification since the consolidation of the Criminalist series to a single class. Except for the alleged cessation of due process by the CAC, the Appellants have not alleged violations which are within PERB's jurisdiction or upon which relief may be granted. In applying the dual test to the actions by CAC found to be justiciable before

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[8]City of Des Moines, 275 N.W.2d 753, 758 (Iowa 1979).

PERB, I conclude that the ending of a due process mechanism by which State employees may petition for classification review to be of significant public importance. This issue, however, fails the second prong of the test, it is not likely to recur. The CAC has returned to its functions as set forth in IDOP rules. If a situation such as occurred in this case should recur, it could be addressed at that time. Case No. 93-MA-17 should be dismissed as moot.

Case No. 94-MA-10

The issue is whether Carl Bessman has stated a claim which is within PERB's jurisdiction in his grievance appeal. If so, has Bessman failed to state a claim upon which relief may be granted?

Bessman alleged in his appeal that IDOP violated §19A.9 of the Code "by failing to reach a reasonable and equitable implementation of the recent changes to the classification plan." The appeal alleged arbitrary and discriminatory use of discretionary authority provided by statute.

Subsection 19A.9(2) of the Code provides in relevant part:

> Each employee in the executive branch, excluding employees of the state board of regents, shall be paid at one of the rates set forth in the pay plan for the class of position in which employed.

The State argued that PERB is without jurisdiction to hear matters governing classifications pursuant to Allen. The State's selection of eligibility dates for pay increases was deemed a mechanism for phasing in pay increases attendant with the consolidation of the Criminalist series. The State claimed that

any mechanism could be fair to some and unfair to others. The State's use of employee eligibility dates was considered fair since, prior to the freeze, employees got reclassified and appropriate pay increases. During the freeze, non-contract employees in all departments did not receive increases. Following the freeze, the same eligibility dates were used to grant pay increases.

The State also pointed out that DPS exercised discretion and granted pay increases as if there had been no freeze. This practice was not extended to other departments within the executive branch of State government. The State argued that the Appellants are not contesting this retroactive element granted by DPS.

The State maintained that the use of employee eligibility dates was the fairest system possible. When the freeze was imposed, Bessman had already gotten a pay increase. When the freeze was lifted, Bessman had to wait.

The State also argued that assignment to a pay level within a range is discretionary to management. The State maintained that seniority is not necessarily a factor in that assignment. With discretionary authority vested with the State and compliance with maintenance of Bessman's salary within the pay range established for Criminalist, the State contended that there can be no violation found and no claim for relief.

Bessman asserted that because he was leapfrogged, the State's actions were arbitrary and discriminatory. Bessman argued that the State's exercise of its discretionary authority worked a financial

disadvantage to him. Bessman claimed that another employee who Bessman had recruited earned $1,000.00 more than Bessman in 1993. Bessman maintained that the difficulty of attempting to avoid leapfrogging was not his problem, but the State's problem. He asserted that for anyone to be "stepped over" was not fair. Bessman argued that the Code requires the classification and pay plans to be fair and equitable and a senior employee receiving less pay than a junior employee in the same classification is not considered fair.

Bessman contended that the State rejected his suggested remedies because it would cause problems with other departments of State government. Bessman argued that three employees in the Criminalist series were not treated fairly. He claimed that leapfrogging occurred for up to nine months and disadvantaged employees can never "catch up." Bessman argued that the gist of his appeal was that some employees were left frozen at their pay rate longer than other employees.

Bessman has not asserted a violation of IDOP rules. He has also not claimed that the State does not have discretion in the area of setting pay within the pay range for a classification. Bessman has not claimed he was paid within the established pay range for the classification of Criminalist. He has stopped short of claiming that the classification and pay plans developed by IDOP pursuant to §19A.9 are unfair and discriminatory. Bessman's claim is that one decision as it applied to him was unfair because it did not grant him privilege based on seniority. This violates

Bessman's concept of fairness and equity. Bessman has failed to demonstrate where seniority is the determining factor in placement on the pay range for his classification. Bessman has failed to state a claim upon which relief may be granted. Case No. 94-MA-10 should be dismissed.

Based on all of the above, I hereby issue the following:

ORDER

The motion to dismiss by the State of Iowa in Case No. 93-MA-17 is granted.

The motion to dismiss by the State of Iowa in Case No. 94-MA-10 is granted.

DATED at Des Moines, Iowa this 21st day of October, 1994.

Charles E. Boldt

Charles E. Boldt
Administrative Law Judge