IN THE SUPREME COURT OF IOWA
Supreme Court No. 20-0477

ROB SAND, Auditor of the State of Iowa,
Applicant-Appellee,

vs.

JOHN DOE, in his official
capacity, and
UNNAMED STATE AGENCY, STATE OF IOWA,
Defendants-Appellants.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY

THE HONORABLE JUDGE HEATHER LAUBER

APPELLANTS' AMENDED FINAL REPLY BRIEF

THOMAS J. MILLER
Attorney General of Iowa

JEFFREY S. THOMPSON
Solicitor General

CHRISTOPHER J. DEIST
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-7204
(515) 281-4902 (fax)
jeffrey.thompson@ag.iowa.gov
christopher.deist@ag.iowa.gov
ATTORNEYS FOR DEFENDANTS-APPELLANTS

CERTIFICATE OF SERVICE

On the 1st day of September, 2020, the Appellants served Appellants' Final Reply Brief on all other parties to this appeal by electronic filing:

John B. McCormally
Chief of Staff / General Counsel
Office of the Auditor of State
Iowa State Capitol Bldg.
Room 111
Des Moines, Iowa 50319
john.mccormally@AOS.iowa.gov
ATTORNEY FOR APPELLEE

_____

CHRISTOPHER J. DEIST
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-7204
christopher.deist@ag.iowa.gov

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ARGUMENT

I. The District Court Erred When It Granted Auditor Sand's Application for Enforcement of Subpoena and Held that Auditor Sand was Engaged in an Authorized Audit at the Time of His Subpoena.

In his brief, Auditor Sand frames the Unnamed State Agency's ("the Agency") dispute as centered around whether the Auditor of State is authorized to conduct additional audits of Agency institutions and to issue subpoenas in accordance with such an audit. *See* Appellee's Proof Brief, at 11-13. However, this misstates the Agency's dispute.[1] As stated in its brief, the Agency fully concedes that the Auditor has the authority to engage in additional audits and is granted a qualified subpoena power to facilitate his ability to obtain necessary information to perform his important work for the people of Iowa.

[1] Additionally, the Auditor misstates the Agency's position regarding the unduly burdensomeness of his subpoena. In his proof brief, the Auditor claims that because the Agency did not raise the issue of the subpoena's burdensomeness upon appeal, the Agency is conceding that the subpoena was not unduly burdensome. *See* Appellee's Proof Brief, at 19-20. This is an erroneous characterization of the Agency's position. As made clear in the underlying record, the Agency did in fact challenge the subpoena in part on the grounds that it was unduly burdensome. *See* App. 83. The reason the Agency did not raise the issue upon appeal is because the District Court substantially limited the scope of enforcement for the subpoena, resolving the burdensomeness concern. *See* App. 117.

The Agency's dispute is, instead, about what qualifies as an "authorized audit" and whether, in the present case, Auditor Sand was in fact engaged in the audit he claimed to be conducting, as required to make his January 8, 2020 subpoena for information about the Institution's transaction valid.

A. Auditor Sand claimed to be engaged in the Institution's normal, annual financial audit for fiscal year 2020.

Continuing with his erroneous framing of the Agency's position, Auditor Sand spends a great deal of his brief attacking the notion that Iowa Code § 11.2(1) limits the Auditor of State to conducting a single financial audit of state agencies per year. From this premise, the Auditor dismisses the Agency's discussion of the normal process for the Institution's annual financial audit as a red herring. In this respect, the Auditor seems to argue that the audit in question was simply a separate, additional financial audit, authorized by Iowa Code § 11.2(1). *See* Appellee's Proof Brief, at 21-22.[2]

[2] Auditor Sand furthers obfuscates this point by claiming that there is a shifting nature behind audits such that there is no meaningful difference between a financial audit and a performance audit/investigation. *See* Appellee's Proof Brief, at 27-30. Ultimately, this is irrelevant because Auditor Sand stated explicitly that the audit he was engaged in was the annual financial audit.

However, this fails for one simple reason – the Auditor himself claimed he was engaged in the Institution's FY 2020 financial audit when he issued his January 8, 2020 subpoena. *See* App. 58 (John Doe confirming in writing that Auditor Sand was connecting the requests to the FY 2020 financial audit of the Institution). This is why the CFO's discussion regarding the normal process for the Institution's annual financial audit is relevant to this case – Auditor Sand's substantial break from the normal process undermines his claim that he was in fact engaged in an authorized audit necessary to trigger his subpoena powers under Iowa Code chapter 11.

i. The break from the normal process for the Institution's annual audit demonstrates that Auditor Sand was not engaged in the proffered audit, thus invalidating his January 2020 subpoena.

As the Agency discussed in their original brief, Auditor Sand significantly broke from the normal process for the Institution's annual financial audit. This break is highlighted by the email exchange between the Agency and Auditor Sand, in which the Agency expressed clear confusion by what audit Auditor Sand was claiming to be conducting when he made his requests. *See* App. 52-53 (the Agency

expressing its lack of awareness of any pending or active audits or examinations).

Indeed, the FY 2019 audit had yet to be completed, and neither the Auditor nor his staff had indicated to the Agency or Institution staff that they intended to begin the FY 2020 audit. Auditor Sand only claimed to be engaged in an audit when he received pushback from Agency and Institution staff regarding his requests for additional, confidential information for the Transaction. *See* App. 52 (Auditor Sand asserting that the Auditor making requests is sufficient indication that he was engaged in an audit). Up until that point, Auditor Sand had simply asserted his right to access confidential documents and information under Iowa Code § 11.41 – a provision only applicable in the context of an authorized audit or examination.

ii. The year-round presence of Auditor's staff at the the Institution does not infer that the Auditor is always engaged in the annual financial audit.

Auditor Sand also disputes the accuracy of the CFO's timeline for the normal process of the Institution's annual audit by pointing out that documents are often produced on a rolling basis even prior to the official "Entrance Conference." *See* Appellee's Proof Brief, at 22-24. However, as noted in the Agency's prior brief, the Institution has a

clear understanding that an audit, especially the annual financial audit, has a distinct beginning and end. Indeed, accepting the Auditor's argument is precisely the sort of nullification of the qualifying statutory language behind the Auditor's subpoena power that the Agency discussed.[3]

B. The Auditor's subpoena powers are dissimilar to those of county attorneys or the state Attorney General.

Auditor Sand argues that the Agency's position regarding "entrance conferences" is "legally off-base," citing cases involving the broad subpoena powers of county attorneys and the state Attorney General. *See* Appellee's Proof Brief, at 25-26. Specifically, Auditor Sand points to this Court's approval of subpoenas issued by a county attorney outside of a formal criminal investigation based upon mere suspicion of criminal behavior, or administrative subpoenas issued by the Attorney General "caused by nothing more than official curiosity." Appellee's Proof Brief, at 25 (citing *State v. Kelley*, 353 N.W.2d 845 (Iowa 1984) (regarding county attorney's subpoena power); *State ex*

[3] The Auditor also seems to want it both ways – he concedes that not every action he takes is part of an audit, but also implicitly asserts that, at least with the Institution, there is no clear cut beginning to the annual audit and thus, he is effectively always auditing the Institution.

rel. Miller v. Smokers Warehouse Corp., 737 N.W.2d 107, 112 (Iowa 2007) (regarding the Attorney General's subpoena power)).

This comparison overlooks the difference in the Auditor's subpoena power – as both parties have noted throughout the pleadings, the Auditor of State is only authorized subpoenas in relation to an ongoing authorized audit or examination. *See* Iowa Code § 11.51 ("The auditor of state shall, in all matters *pertaining to an authorized audit or examination*, have power to issue subpoenas of all kinds...") (emphasis added). Compare this, for example, to the broader language for the Attorney General's subpoena power in handling consumer protection matters, as contemplated in the cited case. Iowa Code § 714.16(4)(a) ("To accomplish the objectives and to carry out the duties prescribed by this section, the attorney general...may issue subpoenas to any person..."). While the Agency concedes that the Auditor has broad subpoena power, that power is still explicitly qualified by § 11.51 and limited to an actual audit or examination.

C. The Auditor does not resolve the public policy concerns raised by this case.

In its previous brief, the Agency raised concerns about the public policy implications of the Auditor's argument and, in turn, the District

Court's ruling. *See* Appellants' Final Brief, at Part I(D). Auditor Sand attempts to sidestep these concerns in numerous ways.

First, Auditor Sand claims there is a public policy justification for not holding that auditing work must only follow from an "entrance conference." This both misstates the Agency's argument and fails to address the opposing concern raised by the Agency. The Agency does not argue that every audit must have an "entrance conference" prior to commencement. Rather, the Agency raised the issue of an "entrance conference" specifically in the context of the normal process followed for the Institution's annual financial audit – the very audit Auditor Sand claims to have been engaged in to validate his subpoena in this case. At its heart, the Agency's argument is centered on the belief that an "audit" is a defined thing, with a clear beginning and end, and that this must be the case to make the various provisions within Iowa Code chapter 11 be effectual.

Second, Auditor Sand dismisses the Agency's fears of "fishing expeditions" by claiming that, from an investigator's standpoint, these are proper and good policy. The Agency rejects this notion – inherent in a fishing expedition is the lack of a reasonable suspicion of specific misconduct, but rather digging through material in the hopes of

possibly finding something untoward.[4] Further, as noted in the Agency's brief, this concern extends to ensuring that the Auditor does not abuse his position to disrupt programs or initiatives that he simply disagrees with on policy grounds, rather than compliance with the law. In this specific case, the Auditor's requests and subsequent subpoena threatened to upend a multi-million dollar, highly complex transaction at the final hour. While the Agency fully concedes that the Auditor of State holds a very important and crucial role in state governance, it argues that role must have limitations of its own to prevent abuse.

Third, the Auditor seems to misunderstand or misstate the Agency's concerns regarding the implication of confidentiality requirements on this issue. Namely, the Agency noted that not only are its institutions beholden to various confidentiality requirements, but so too, is the Auditor himself. Iowa Code § 11.42(1) states:

> Notwithstanding chapter 22, information received during the course of any audit or examination, including allegations of misconduct or noncompliance, and all audit or examination work papers shall be maintained as confidential.

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[4] Auditor Sand also leaves out an important qualification to his right to access confidential information and documents under Iowa Code § 11.41(1). Specifically, § 11.41(1) states that the Auditor only has this full-right of access "*when conducting an audit or examination required or permitted by this chapter*..." (emphasis added).

Thus, not only is the Agency concerned with ensuring that the confidentiality of its own information is maintained under the law, but there are serious implications for the Auditor himself. Iowa Code § 11.41 essentially serves as a gag order of sorts, up to and until the Auditor issues his final opinion letter or report.[5] Auditor Sand has a track record of making public comments on various agency conduct or programs, and thus, under his own interpretation of chapter 11, risks running afoul of his own confidentiality requirements. This is precisely why the Agency believes it necessary for the Court to provide clear guidance on the beginning and end of a chapter 11 audit.

D. The Agency Has Not Engaged in Bad Faith Delay Tactics.

At the end of his proof brief, the Auditor alleges that the Agency's valid concerns regarding the legitimacy of his subpoena are simply part of a bad faith strategy to prevent the Auditor from accessing the requested documents prior to the "financial close" of the Transaction. In support of this incredibly serious allegation of misconduct, the Auditor provides a highly misleading timeline of events, calls for the

[5] There are two other exceptions to the confidentiality requirement of § 11.41(1), namely "as necessary to complete the audit or examination" and "to the extent the auditor is required by law to report the same or to testify in court." *See* Iowa Code § 11.41(2)(a)-(b).

Court to speculate as to improper motive, and alludes to a separate, wholly unrelated case as evidence of a "pattern of bad faith by the [Agency] and their institutions."[6] Appellee's Proof Brief, at 38. In this section, the Agency will address each of the Auditor's misleading claims:

i. That the Agency "[v]iolated their Iowa Code Chapter 11 obligations to 'cooperate' and provide access 'upon request' to 'all materials at all times'".

Iowa Code § 11.41(1) states, in pertinent part:

> All audited or examined entities shall cooperate with the auditor of state in the performance of the audit or examination and make available the information, records, instrumentalities, and properties upon the request of the auditor or state.

What the Auditor again misstates is that the Agency is not disputing its or its institutions' obligations to cooperate with the Auditor in the performance of an authorized audit or examination. Rather, as has been repeatedly pointed out in the Agency's briefs, the Agency's

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[6] The case the Auditor cites dealt with a dispute over collective bargaining negotiations between the Agency and a union representing faculty at another sub-division of the Agency. *See United Faculty v. Iowa Public Employment Relations Bd.*, Polk County No. CVCV058643, Ruling on Judicial Review (Jan. 13, 2020). At the heart of that matter was whether the Agency was engaged in bad faith delays during the negotiation process in an effort to wait out the passage of legislation that would substantially reform collective bargaining rights for public employees in Iowa. *Id.* The nature of that case is significantly different from the nature of the present case.

dispute is whether the Auditor was in fact engaged in such an audit in this matter. Absent an ongoing, authorized audit or examination, neither the Agency nor its institutions are obligated by § 11.41(1) to cooperate with the Auditor's requests.

ii. That the Agency's classification of materials as "confidential" was irrelevant.

As with the previous point, the Agency is not disputing the Auditor's ability to access confidential materials in the course of an audit or examination. Again, the Agency is merely disputing whether there was such an audit or examination at the time of the Auditor's requests, as required to trigger his right to access confidential materials. Iowa Code § 11.41(1) and (2) make it explicitly clear that the Auditor's right of access to confidential materials only applies when he is engaged in an authorized audit or examination. The Auditor of State does not have "full access" to confidential materials at all times. Given that the Agency, at the time of the email exchange referenced by the Auditor, was unaware of any ongoing or open audit or examination, the Agency's classification of the requested materials as confidential was highly relevant.

iii. That the Auditor was directed to the Agency and John Doe.

This is a slightly misleading characterization of the events. As indicated by the email exchange, Auditor Sand first raised his requests in part to a member of the Agency, who then, in good faith, directed the Auditor to John Doe and the Agency's general counsel. Further, at that time, the scope of Auditor Sand's request was far more limited than the eventual scope of his January 2020 subpoena. When the Agency raised the issue of it being the wrong party, it was in relation to the far broader scope of requests contained in the subpoena.

iv. That the Agency "[f]ailed to comply with a lawfully issued subpoena."

Clearly the lawfulness of the Auditor's January 2020 subpoena is at the heart of this case. The Agency asserting its right to challenge the lawfulness of a subpoena is hardly a "bad faith delay tactic."

v. That the Agency "[i]gnored the subpoena and the action to enforce until after the District Court filed an order sustaining the subpoena" and "[c]hallenged the action only after the order sustaining the subpoena."

This is an inaccurate framing of the Agency's actions and the procedural history of this case. As discussed in the Agency's statement of facts and procedural history of the case, the Agency did not simply ignore the Auditor's subpoena or his Application for Enforcement.

Rather, the District Court filed an *ex parte* order to enforce the subpoena prior to the deadline for the Agency to file its response to the Application. *See* App. 67-71. Upon receiving notice of the District Court's *ex parte* order, the Agency quickly drafted and filed a motion to reconsider and stay the order, pointing out to the District Court that it had effectively jumped the gun. *See* App. 69-71. At the same time, the Agency also filed its intended response to the Auditor's Application. *See* App. 75-84. That the District Court erroneously sustained the Auditor's subpoena prior to allowing a response from the Agency is not evidence that the Agency was or is engaged in "bad faith delay tactics" when it subsequently filed its intended response.

vi. That the Agency has "[o]ffered misleading arguments to delay enforcement..."

This claim is simply a reassertion of the Auditor's position on the merits of the Agency's legal arguments. Clearly there is a dispute over the confines of an "authorized audit or examination," which is why the Agency felt it necessary to bring this appeal.

In short, the Auditor seems to wish to frame a challenge to an administrative subpoena as inherently a "bad faith delay tactic," a position that is out of step with the case law in Iowa. Administrative subpoenas are important constructs, utilized by several state agencies.

However, for similarly important reasons, Iowa courts have long recognized limitations on those subpoenas, affording subpoenaed parties the right to challenge the validity of administrative subpoenas. That the Auditor disagrees with the Agency's challenges does not mean the Agency is engaged in bad faith delay tactics.

CONCLUSION

For these reasons, the March 8, 2020 Order Regarding Motion to Enforce Subpoena issued by the District Court should be reversed.

COST CERTIFICATE

We certify that the cost of printing the Appellants' Final Reply Brief was the sum of $0.00.

THOMAS J. MILLER
Attorney General of Iowa

_____
CHRISTOPHER J. DEIST
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-7204
christopher.deist@iowa.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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Dated: September 1, 2020

CHRISTOPHER J. DEIST
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-7204
christopher.deist@ag.iowa.gov