IN THE SUPREME COURT OF IOWA

ROB SAND, AUDITOR OF THE STATE OF IOWA,
Applicant-Appellee,

v.

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

No. 20-0477

BRIEF OF AMICUS CURIAE KIRKWOOD INSTITUTE, INC.

Appeal from the Iowa District Court for Polk County
Hon. Heather Lauber, District Judge
Case No. CVCV059696

Alan R. Ostergren
President and Chief Counsel
500 Locust Street, Suite 199
Des Moines, Iowa 50309
alan.ostergren@kirkwoodinstitute.org
(515) 207-0134

Table of Contents

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

Statement of Interest of Amicus Curiae

The Kirkwood Institute, Inc. is a nonprofit corporation formed under the laws of the State of Iowa. Its mission is, in part, to advance constitutional governance in the State of Iowa by advocating for the enforcement of rights guaranteed to all Iowans by the Constitution of the State of Iowa and the Constitution of the United States. A particular area of concern for the Kirkwood Institute is the separation of powers. The Kirkwood Institute submits this brief because it has identified an important issue about the jurisdiction of this Court which has not been advanced by the defendant-appellants.

Summary of the Argument

Iowa law requires state entities to resolve their disputes by binding arbitration, not litigation. The precedents of this Court demonstrate that the state auditor and the unnamed state agency are both entities subject to this jurisdiction-stripping statute. This case must be dismissed.

ARGUMENT

I. This Court lacks subject matter jurisdiction over a dispute between entities of state government.

A. Standard of review.

Review of a lower court's determination of subject-matter jurisdiction is reviewed for correction of errors at law. *Klinge* v. *Bentien*, 725 N.W.2d 13, 15 (Iowa 2006). Because the parties did not raise the issue below, however, review must be de novo.

B. Preservation of error.

The lack of jurisdiction may be raised at any time. *Bailey* v. *Batchelder*, 576 N.W.2d 334, 337-38 (Iowa 1998) ("Every court has inherent power to determine whether it has jurisdiction over the subject matter of the proceedings before it. It makes no difference how the question comes to its attention.")

C. Iowa law requires a dispute between two administrative departments of state government to be resolved by binding arbitration, not the courts.

Iowa law contains a broad prohibition against agencies of state government resorting to the courts to adjudicate their disputes:

> Any litigation between administrative departments, commissions or boards of the state government is prohibited. All disputes between said governmental agencies shall be submitted to a board of arbitration of three members to be composed of two members to be appointed by the departments involved in the dispute and a third member to be appointed by the governor. The decision of the board shall be final.

Iowa Code § 679A.19 (2019).

This legislation was "enacted to reduce the costs of resolving disputes between two state agencies. When this provision was proposed, the purpose of the bill was to lower litigation costs for internecine disputes between state departments…." *Iowa Individual Health Benefit Reinsurance Ass'n* v. *State University of Iowa*, 876 N.W.2d 800, 811 (Iowa 2016) (hereinafter "*IIHBRA*").

The dispute in *IIHBRA* was between a state-chartered nonprofit and the regent universities over unpaid assessments by the nonprofit

under an employee health coverage reinsurance system. *IIHBRA*, 876 N.W.2d at 801-02. The regent universities raised the lack of subject-matter jurisdiction unsuccessfully in the district court. The teachings of this case are quite relevant to this present dispute between the state auditor and the unnamed state agency. We will return to it in a moment.

An early decision of this Court construed the arbitration statute in an investigative dispute between state entities. In *Llewellyn* v. *Iowa State Commerce Commission*, 200 N.W.2d 881 (Iowa 1972), the Court considered a dispute between the Iowa State Commerce Commission and the Iowa State Board of Engineering Examiners over proceedings related to the approval of a private electric utility to construct certain power transmission lines. *Id.* at 882. The engineering board believed the commerce commission had illegally approved exhibits in the administrative proceeding because those documents had not contained the seal of a licensed engineer. *Id.*

The engineering board argued that the arbitration provision did not apply to it because it had specific statutory authority to conduct investigations of unlicensed engineering activity. *Id*. at 883 (citing Iowa Code Chapter 114 (1971)). The board argued the power to investigate meant "it could compel defendant to appear before it for a hearing on the dispute and argues that upon failure of defendant to appear, then the board could surely seek the court's help to enforce [the statute]." *Id.* The board also argued that the statute permitting it to investigate was a more specific and recent statute than the provisions which required arbitration. *Id.* at 884.

This Court noted that the engineering board had no specific statutory authority to hail another state agency into court and held that the dispute must be arbitrated. "We now hold the dispute between the board and the commission was of a type that required submission to arbitration under [the predecessor to § 679A.19] and further that chapter 114 provides no statutory grant of authority

sufficient to enable the board to intervene in an action against another state agency."

This Court's next examination of the statute demonstrated that it would look to the substance of the dispute, not the named parties, to determine if the prohibition applies. *State, ex rel. Iowa Dept. of Health* v. *Van Wyk*, 320 N.W.2d 599 (1982) was a dispute over the scope of chiropractic practice, with the Department of Health bringing a suit in the name of the state against the director of the board that regulated chiropractors. This Court rejected the effort. *Id.* at 602. ("The board argues this is a suit between the state and a board rather than between the department and the board and, hence, section [679A.19] is inapplicable. But this suit is only nominally pressed by the state. It is fundamentally a dispute between the department and the board and plainly falls within the statutory prohibition.")

This Court's precedents examining Iowa Code 679A.19 show that the statute's purpose is to eliminate litigation costs in intragovernmental disputes, that a state entity must have specific

statutory authority to sue another state entity, and that the substance of the dispute, not the contents of the caption, will govern its applicability. Let us now apply these precedents to the current case.

D. The arbitration statute applies to both the state auditor and the unnamed state agency.

The arbitration provision does not contain its own definition section. As noted above, it was adopted in 1958 and was previously codified at Iowa § 679.19. "Under this statute, disputes that are fundamentally between *executive branch departments* must be resolved through arbitration; litigation in the courts is prohibited…." *IIHBRA*, 876 N.W.2d at 810 (emphasis added). An examination of the statute leads to the inevitable conclusion that it does not use terms in a limited or technical sense. The first sentence illustrates state entities by calling them "administrative departments, commissions or boards of the state government." The next sentence summarizes that description as "said governmental agencies" and then summarizes them again by calling them "departments." The statute's use of these

terms in such an interchangeable manner shows that it illustrates the kinds of state entities to which it applies rather than using terms in a cramped or technical sense.

This is how this Court understood the statute in *IIHBRA*. This Court noted that there are many statutory provisions which use terms like "department" or "commission" for various entities. *Id.* at 811. It did not find a universal definition for the purposes of Iowa Code § 679A.19. *Id.* Rather than seeking an exhaustive list in the Iowa Code, this Court examined the characteristics of the organization to determine if it was an entity of the state government.

It started with the workforce. "The employees of the IIHBRA are not paid by the State of Iowa. By contrast, the staff members of state boards and commissions are state employees." *Id.* Next was the leadership structure. "Most of the members of the IIHBRA are private entities. A majority of its board of directors are private persons or representatives of private insurers, although our state boards and commissions are also populated with private citizens." *Id.*

This Court then considered the legal representation of the entity. "The IIHBRA is represented by private legal counsel, while the universities and other state boards, commissions, and departments are represented by the Iowa Attorney General." *Id*. This factor cut against treatment as a state entity, as did the last one. "The IIHBRA is funded by its assessments collected primarily from private sources. It does not receive appropriations or funding from the state treasury (except indirectly to the extent public entities pay assessments)." *Id.* These factors led this Court to find that the IIHBRA was not a state entity and could pursue its claims in the courts.

IIHBRA teaches, therefore, that this Court will examine four factors to determine whether an entity is subject to the arbitration provision:

1) Is the entity's workforce made up of state employees?
2) Is the governance of the entity public or private?
3) Is the entity represented by private legal counsel?
4) Is the entity funded by appropriations or directly from public entities?

Each of these factors demonstrate that the state auditor is subject to the arbitration provision.

The first, second, and fourth factors need little discussion. There can be no dispute that the state auditor is a public official, that his office is staffed with employees of the State of Iowa, and that his office is funded by appropriations from the general fund and fees paid by other public entities for audit services.

The third factor deserves additional attention. In *IIHBRA* this Court cited to the official explanation of the original legislation and its focus on litigation expenses:

> This bill would prevent litigation between state departments over disputes of questions of law or fact. Such litigation is expensive, time-consuming and wasteful of public funds. Legal counsel is employed on both sides and in many cases such litigation continues for years. This bill would submit such internecine disputes to arbitration.

Id. (citing H.F. 594, 58th G.A., Reg. Sess., explanation (Iowa 1959)).

"This case is not a dispute between two public entities with both sides represented by the attorney general at public expense–the

recurring situation this statute was enacted to address." *Id.* The unnamed state agency is obviously represented by the attorney general. The state auditor is represented by a publicly funded attorney in his office. Admittedly, our situation is not *completely* on point because the state auditor is not represented in this action by the attorney general's office.

But should he be? The attorney general is charged with the duty to "[p]rosecute and defend all causes in the appellate courts in which the state is a party or interested." Iowa Code § 13.2(1)(a). And he is to "[p]rosecute and defend all actions and proceedings brought by or against any state officer in the officer's official capacity." Iowa Code § 13.2(1)(c).

These statutes form the basis of the attorney general's traditional duty as the attorney for state government. Indeed, as this Court well knows, the attorney general appears before it in any litigation in which the State of Iowa appears–whether through an elected statewide official, a board, a department, or any other form.

This is beyond dispute. The state auditor has recently accepted this representation in an unrelated case[1] relating to his enforcement authority.

The state auditor might argue that these statutes *permit* the attorney general to so act but do *not forbid* another state employee who happens to be a lawyer from initiating litigation on his behalf. But he would be wrong. "Compensation shall not be allowed to any person for services as an attorney or counselor to an executive department of the state government, or the head of an executive department of state government, or to a state board or commission." Iowa Code § 13.7(1). "However, the executive council may authorize employment of legal assistance, at reasonable compensation, in a pending action or proceeding to protect the interests of the state, but only upon a sufficient showing, in writing, made by the attorney general, that the

---

[1] *Iowa Communities Assurance Pool* v. *State Auditor*, Polk County No. CVCV059487. Assistant Attorney General Emily Willits appeared on behalf of the state auditor in the district court.

department of justice cannot for reasons stated by the attorney general perform the service." *Id.* This statute is litigation focused. The lawyers who appear for the state in court must be with the attorney general's office or be specially appointed.

The code provides a procedure for appointment of special counsel in certain circumstances, but only with the attorney general's consent and approval. "If the attorney general determines that the department of justice cannot perform legal service in an action or proceeding, the executive council shall request the department involved in the action or proceeding to recommend legal counsel to represent the department. If the attorney general concurs…the person shall be employed. If the attorney general does not concur…the department shall submit a new recommendation." *Id.*

The effect of these provisions is clear. The attorney general has the original duty to represent the state. If there is a reason the attorney general cannot do so in a specific matter, the executive council and the attorney general must work together to find special counsel for that

matter, and that matter only. The attorney general retains a veto over any particular attorney suggested by the department needing special counsel.

The Kirkwood Institute has examined the records of the executive council and has found no authorization for the hiring of special counsel to represent the state auditor in this proceeding. Any compensation paid to the attorney representing the state auditor for services to litigate this case, in the absence of such authorization, was illegal.

Lawyers from the Iowa attorney general's office should be on both sides of this case. This demonstrates the wisdom of stripping the courts of jurisdiction to resolve disputes between state agencies. Conflicts of interest which are intractable in the courts can be easily sorted through in an arbitration proceeding. And lawyers might not even be necessary to arbitrate a dispute.

And let us anticipate an argument the State Auditor might make in reply. He is elected independently. This is certainly true. It is also

irrelevant. The only reason Iowa Code § 679A.19 needs to exist is for disputes between state entities which have separate political control. *No* dispute between agencies with unified political control should ever play out in court. No one should be able to contemplate a lawsuit between, for example, the Department of Public Safety and the Department of Transportation. Basic separation of powers principles would forbid this–it would be like the Governor taking herself to court.

The four factors in *IIHBRA* support the conclusion that this dispute between the state auditor and the unnamed state agency cannot be litigated. So, too, do this Court's other two leading precedents examining the arbitration statute. *Van Wyk* is particularly relevant to the present dispute. The state auditor has named (or not) in his petition a state agency and the head of the board that controls that state agency. The fact that the board head has been named in his official capacity does not matter. *Van Wyk* teaches that this Court will look to the substance of the dispute to determine if the arbitration

provision applies – not the pleading strategy of the state entity seeking to use the courts.

And *Llewellyn* agrees. There is no specific authority in Iowa Code for the state auditor to sue another entity of state government. He has general investigative power, to be sure. Iowa Code § 11.41. He can issue subpoenas. Iowa Code § 11.51. And he can make use of the procedure in Iowa Code § 17A.13 to enforce those subpoenas. But none of these statutes specifically provide that he can take another state entity to court.

Iowa Code § 679A.19 and this Court's cases examining it all lead to one conclusion. The state auditor must press his investigative demand before an arbitration panel. The courts lack jurisdiction to hear this case.

CONCLUSION

The case should be remanded to the district court with the instruction to dismiss it.

Respectfully submitted,

THE KIRKWOOD INSTITUTE, INC.

By: /s/ Alan R. Ostergren
Alan R. Ostergren
President and Chief Counsel
500 Locust Street, Suite 199
Des Moines, Iowa 50309
alan.ostergren@kirkwoodinstitute.org
(515) 207-0134

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because it contains **2618** words, excluding parts of the brief exempted by that rule.

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type style requirements of Iowa R. App. P. 6.903(1)(f) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Iowan Old Style, 14-point type.

No party, their counsel, or other individual has authored this brief in whole or in part. No party, their counsel, or other individual has contributed funds to the preparation of this brief.

/s/ Alan R. Ostergren
Alan R. Ostergren