Attorney Work Product/ Privileged and Confidential Communication

The legitimacy of the reorganization of a layoff unit within the Department of Administrative Services ("DAS") has been called into question; specifically, the settlement agreements entered into with some of the affected employees. The following information should be considered when evaluating the allegations and determining the appropriate path forward.

Pre-2012, the DAS construction bureau was notorious for its inability to complete multimillion dollar construction projects on-time and within budget. Dissatisfied state agency customers, lawsuits, and mismanagement of taxpayer dollars drove DAS to make a change. DAS could have trained staff, added staff, and purchased technology systems and software to make the change.[1] Doing so would have required a large front-end capital investment and taken a considerable amount of time.[2] Instead, DAS chose to reorganize the bureau and privatize construction management.[3]

The deficiencies in the DAS construction bureau formed the basis for the reduction-in-force (the "RIF") plan. The RIF plan was prepared and submitted up the chain-of-command for signature. The RIF plan outlined how and which positions were to be eliminated and that the work performed by the former employees was to be privatized.[4] The RIF complied with applicable laws, rules, and procedures. The Department of Management ("DOM") signed off on the reorganization in August of 2011.[5]

The RIF was completed pursuant to the approved plan. Specifically, of the eleven (11) construction bureau employees, eight (8) construction project managers were laid off and three (3) administrative staff were retained. Additionally, a Capitol Complex Maintenance Program

---

[2] The affected employees were already paid in excess of $80,000 per year and some close to $100,000 per year.

[3] The change brought about immediate benefits which have been recognized both within State government and by the construction industry.

[4] The DAS Construction Bureau and Capitol Complex Maintenance Program constituted the layoff units. The layoff unit would have been much larger if the employees were contract-covered. As a result, they would have bumped less senior employees.

[5] DAS also notified the Governor's staff that it expected that some of the affected employees would claim that the RIF was motivated by the Director's affiliation with various contractor organizations, which is of course untrue. One of the affected employees, Dean Ibsen, was an active member of the American Institute for Architects and advisor to the Capitol Planning Commission. DAS expected that Ibsen would allege that the layoff was motivated by his affiliation with the AIA which, in a sense, competes with contractor organizations over construction matters.

Manager was laid off.[6] Of the affected employees, six (6) filed non-contract grievances (the "RIF grievances").

It is common place for State employees to file grievances alleging management's actions violate administrative rules, state law, or collective bargaining agreements. DAS tracking sheets show that it receives over 700 grievances per year (and approximately 2300 over the last three years). These RIF grievances represent less than 1% of the grievances filed annually.

In the last three years, approximately 300 of the 2300 grievances filed have been settled.[7] Many grievance settlements involve payment, reinstatement and/or a reduction in discipline. The overwhelming majority (if not all) of these settlements happen without the Governor's knowledge or approval. Executing settlements without involvement of the Governor's office follows a longstanding practice at the State that precedes this tenure of the Governor.[8] It is also in apparent accord with Iowa Code Chapter 8A which vests in DAS the authority and responsibility of managing human resources at the State.

Employees who are not covered by a collective bargaining agreement may file noncontract grievances with DAS. If the employee is dissatisfied with DAS's determination then the employee may appeal to the Public Employee Relations Board ("PERB"). Iowa Code Chapter 20 charges PERB with oversight of public employment and finally ruling upon grievances filed in accordance with Iowa Code Chapter 8A. DAS is charged with following the law, but at the same time advancing management's interests. The tension between management and the employee population is normal in the public sphere and intended to be balanced and monitored by PERB. PERB, not DAS, is ultimately responsible for resolving grievances.

PERB has the power to mediate grievances and strongly encourages such. The RIF grievances were mediated by a PERB administrative law judge ("ALJ").[9] During mediation, settlement discussions took place between DAS and the ALJ, and then between the ALJ and the employee and the employee's attorney. This is the typical caucus method in mediation.

There were no secret negotiations. The final terms of the RIF grievance settlement agreements were negotiated during mediation at PERB. The ALJs at PERB brokered and approved the final versions of the settlement agreements.[10]

DRAFT

---

[7] Grievances that are not dismissed or settled go to arbitration or hearing. The average arbitration/hearing costs the State more than $5,000 (which includes $2,000 for the arbitrator plus time, travel, witness, and exhibits preparation).

[8] Prior to Carroll's tenure as DAS Director, State human resources employees settled grievances on their own with little oversight. Frankly, it is also in apparent accord with Iowa Code Chapter 8A and DAS's role as the administrative wing of State government.

[10] Although PERB did not necessarily draft these agreements, PERB on occasion authors settlement agreements for the parties with confidentiality clauses.

Some of the RIF grievance settlements contained confidentiality clauses. These clauses were fair and mutual, i.e., applied to both the State and the grievant. And, they were reviewed by PERB before the settlements were executed.

Confidentiality clauses in settlement agreements with employees have been used for several years (going back to at least 2008) at the State before the arrival of Mike Carroll. Confidentiality clauses are at times requested by the employee or his/her attorney. An employee would do so because he or she would benefit by the State not disclosing information in response to inquiries about the employee. Moreover, if DAS requests such a clause it may be included at the direction of a third-party (e.g. a constituent executive branch agency and/or its attorney general).

In regards to the RIF grievance settlements, confidentiality was only discussed after settlement was reached with the employees.[11] This is supported by the fact that some of the settlement agreements do not include confidentiality clauses. The allegation that settlement agreements with confidentiality clauses generated greater settlement payments is contradicted by the fact that settlement agreements without the confidentiality clause were in some cases for a greater payment amount.

Before settling the RIF grievances, in accordance with DAS practice, a risk and exposure analysis was performed. The total estimated exposure amount was approximately $4.3 million[12], while the RIF grievance settlements were approximately $262,000.[13] Thus, the actual settlement amounts were dwarfed by the total exposure.[14] The monetary exposure, along with the fact that DAS entered into services contracts with construction management companies to provide the same services, which would have been in jeopardy if the employees would have been reinstated by PERB, led DAS to determine that it was in the taxpayer's best interest to settle.

Opinions vary as to whether or not a confidentiality clause in a settlement agreement with an employee is appropriate.[15] Pursuant to Iowa Code Chapter 22, the general rule is that most

DRAFT

[11] DAS had knowledge that the employees were colluding together about their grievances in an effort to undo the reorganization and/or drive up their settlement payments. DAS thus took the position that a confidentiality clause was reasonable in light of the circumstances at the time.

[12] The $4.3 million estimate represents risk exposure for four of the laid off employees (three from the Construction Bureau and one from the Energy Management Program). Thus, the actual exposure could have been more.

[13] The reason the settlement amounts differ between the employees is due to the difference in the employees' respective salaries and years of service.

[14] Despite the fact that the reduction in force complied with the law, there was risk that PERB would find that the layoff was inappropriate. The grievants asserted that the layoffs circumvented the progressive discipline process and were motivated by politics/ill-will/contractor associations. Although that was not the case, there was risk that PERB would find against the State, particularly due to the political composition of the Board. That risk combined with the high dollar exposure and the desire to bring finality to the issue, sooner rather than later, made settlement the best option.

[15] Also of important note, is that many of the confidentiality clauses (including the subject settlement agreements) are prefaced with the statement: "subject to Iowa law." Thus, both Parties not only agreed to the inclusion of the clause but also understood that there may be times the agreement would not be confidential. For example, if there

documents in the custody of the State are public record. However, Iowa Code Section 22.7 contains a number of enumerated exceptions to this rule. One of those exceptions is documents related to personnel matters. One can make a good faith argument that a settlement agreement with an employee concerning his or her employment is a personnel matter and thereby confidential. AFSCME, among others, strongly believes that settlement agreements with an employee arising from a grievance should be confidential based on these law and due to the harm that disclosure of such settlement agreements might cause an employee.

Considering the information at hand, PERB's involvement in mediating and brokering the settlement terms, the past practice at the State of using confidentiality clauses, the position of AFSCME, the Attorney General's tacit approval, the exclusion of personnel matters from the definition of public records, the bona fide negotiations, the review and approval by the employees' attorneys, and the desire to finally and efficiently resolve this conflict, made the inclusion of a confidentiality clauses in these agreements reasonable.

Whether or not settlement agreements with employees are public records is an ongoing controversy in the media as evidenced by the reaction to a 2012/2013 Des Moines Register (the "Register") public records request and subsequent set of articles. The Register requested settlements and arbitration decisions related to employees who had been reinstated after being terminated. Initially, DAS refused to turn over the requested documents because of the longstanding position taken by DAS that the documents were personnel records under Iowa Code Chapter 22.7. The Register challenged this determination. DAS subsequently sought the advice of the AG. At first, the AG advised DAS to turn over the documents. Later, the AG advised DAS to redact the documents prior to disclosure. Pursuant to these instructions, DAS released the redacted versions of the documents to the Register.

The Register subsequently published stories highlighting employees who had committed bad acts and were later reinstated or rehired. AFSCME Iowa Council 61 ("AFSCME") grieved the disclosure by DAS and threatened a lawsuit alleging a violation of Iowa law.[16] [redacted]

Varying opinions of whether or not settlement agreements are confidential arose in part due to recent changes in public records law. Iowa Code Section 22.7 was amended in 2012 and took effect roughly the same time the RIF grievances proceeded through the non-contract grievance procedure. The 22.7 exclusion was narrowed, thereby causing some documents which had been traditionally treated as confidential to now be public records. At or about this same time, the legislature also passed Iowa Code Chapter 23 which created the Public Information Board. Before that time, no such board existed.

---

was a public records request that was later determined to require the production of these documents, as there was in this case. Hence, there was clearly no intent to contravene Iowa law.

[16] One of the employees [redacted] who signed a settlement agreement refused to answer questions posed by the Register based on the confidentiality clause. This particular employee was represented by the same law firm that represents AFSCME.

There was also an Iowa Court of Appeals decision that was issued in 2013 concerning whether or not a settlement agreement with a public employee was public record. The court ruled that the particular agreement at issue in that case was public record. This appellate court opinion apparently caused Deputy Attorney General Julie Pottorff to change her Open Records memorandum upon which DAS attorneys relied. The 2012 version of the memorandum did **not** indicate that settlement agreements with employees were public record. Pottorff changed her 2013 memorandum to state that settlement agreements with employees were public record. The 2013 memorandum was not published at the time of the RIF settlement agreements.

DAS is unaware of any formal AG opinion on this issue. Prior to these events, DAS was not advised by the AG or PERB that inclusion of a confidentiality clause was inappropriate. In fact, attorneys at DAS consulted with the AG on inclusion of confidentiality clauses in settlement agreements with employees. The AG not only approved usage of such a clause but edited it to be stronger.

Following the above described chaos with the Register, all public records requests concerning employee matters went to the AG for review and recommendation as to whether or not the document should be disclosed.

It is assumed that is what happened here, i.e., the Register asked for settlement agreements and DAS turned them over to the Register at the advice of the AG's office without much internal conversation about whether or not the agreements should indeed be turned over. No doubt there should have been more conversation and planning as to how to respond to such an inquiry. Not that the documents should not have been disclosed to the Register, but instead what caused them, why they were created, and why based on the law and longstanding practice at the State they were not inappropriate and certainly not scandalous.

All that said, there is an opportunity here for leadership at the State to make Iowa more transparent. Leadership can step forward and set a clear policy with regard to the public or private nature of settlement agreements with employees and the appropriateness of including confidentiality clauses in settlement agreements with employees. The lawmakers could also step forward to resolve the apparent conflict in Iowa law regarding these matters evidenced by the longstanding past practice of treating settlement agreements with employees as confidential. While the way the story has been told is disappointing if the ultimate result is that the taxpayers will have more access to government information then the outcome of these events is a good result.