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July 13, 1989

M E M O R A N D U M

TO: CHAIRMAN JOHN CONNORS AND MEMBERS OF THE SERVICE COMMITTEE
OF THE IOWA LEGISLATIVE COUNCIL

FROM: John Fatino

RE: Other States' Ombudsman Authority

According to information obtained from Mr. William Angrick II, four other states in the nation have Ombudsmen that are responsible to their respective Legislatures. Most other states have a "citizens' complaint" type office with the head of that office being responsible to the Governor.

Of the four states with a Legislative Ombudsman, two states exclude political subdivisions from the Ombudsman's authority. Nebraska excludes political subdivisions. Neb. Rev. Stat. sec. 81-8.240(1)d (1981). Puerto Rico limits the authority of the Citizens' Investigating Official to the Executive Branch with a few exceptions. P.R. Laws Ann. tit. 2, sec. 702(a) (1988).

Alaska falls somewhere between the two groups of states. Initially, Alaska extends the Office of the Ombudsman's jurisdiction to administrative agencies. Alaska Stat. sec. 24.55.100(a) (1988). However, a municipality by ordinance may elect to be subject to the jurisdiction of the Ombudsman. Id. at sec. 24.55.320.

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Hawaii is the only other state that, like Iowa, extends the Ombudsman authority to local government. It is noteworthy that Hawaii does exclude the mayor of counties and councils of counties from the jurisdiction of the Ombudsman. Haw Rev. Stat. sec. 96-1(a)(7) and (8) (1988).

In summary, Nebraska and Puerto Rico do not extend jurisdiction of the Ombudsman to local government entities. Alaska allows a municipality to elect to be under the jurisdiction of the Ombudsman. Hawaii is the only other state that allows the Ombudsman jurisdiction over local entities.

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July 12, 1989

Hon. Richard VandeHoef
State Senator
R.R.
Harris, Iowa 51345

Dear Senator VandeHoef:

This letter is in response to your telephone call of today.

The Citizen's Aide initiated an "investigation" of the Osceola County Sheriff on June 7, coming to our county with three staff members, unannounced to any local authorities. The Citizen's Aide was acting on complaints from former deputies and other local persons who were aligned with the sheriff's opponent in the election campaign. The Citizen's Aide subpoenaed the Sheriff with no fewer than six subpoenas for various records and for his testimony. The Citizen's Aide also searched the Sheriff's office and personal vehicle.

For two days, three subordinates of the Citizen's Aide set up shop in the Osceola County courthouse, conducting interviews of various persons. This naturally attracted a great deal of attention, and resulted in immediate newspaper accounts. My files contain copies of various newspaper articles which you may gladly have if you desire.

Because the "investigation" was done in such a circus atmosphere, the Sheriff was immediately placed on trial in the press. Records which were examined in the county offices, for example, were left out by the Ombudsman's representatives, so that it was easy for newspapermen to deduce the subject of the investigation. Newspaper accounts were immediate in their reporting of the subject of the "investigation." While the Sheriff was told that the complaints and complainants were confidential, the newspapers clearly knew what was going on. Obviously, this was of great concern to him and his family during an election year.

Over the next months, the Citizen's Aide subpoenaed various people, examined documents, involved the state

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auditor's office in an audit of the office, and made trips to Sibley at taxpayer expense. In addition, he initiated a lawsuit in the Polk County District Court seeking to compel the sheriff to appear before the Citizen's Aide, as a witness against himself. The most serious matter uncovered by all this activity, appears to be that the sheriff made telephone calls on his office phone to cattle dealers at a cost of a few hundred dollars to the county over a three year period. Obviously it has cost a great deal more than \$300 of taxpayer money, to have the Citizen's Aide uncover this. What is more, the Ombudsman's suit was ultimately dismissed. The legal bills to Rolfes, ultimately paid by Osceola County, have to date been approximately \$12,000. One county official was told by the Ombudsman that his office has spent \$15,000 of staff time on this matter.

The Sheriff's complaint with the Citizen's Aide is that his office acted with total disregard for the sheriff's rights. As an elected official, the sheriff depends upon the good will of the public for his livelihood. The sheriff has a family to support. Yet, the initiation of this matter was done in the most public manner possible. Whatever one's opinion of the Sheriff, surely the man is entitled to have this handled discreetly.

A related complaint is that the law governing the Citizen's Aide, requires that he refer criminal matters to the appropriate authorities. This was such a case. The complaints from the first day, were of supposed criminal activity. The appropriate means of handling this would have been a referral to criminal law enforcement authorities, who would then have conducted a discreet investigation. A great deal of public time and expense could have been saved, if the Ombudsman's ego had not gotten in the way. Instead, he chose to retain the case, apparently because he wanted the publicity and credit for "taking down" the Sheriff.

Present law enables the Citizen's Aide to make an investigation of a public official and publish a report of his findings. The official may include a written response as a part of the report. This provides little protection for the official, since the press will not focus on his response but on the Citizen's Aide's findings, which have the imprimatur of the state's authority. It appears that the Citizen's Aide has focused his efforts in recent years, on use of this law to investigate and criticize law enforcement officials around the state.

Our local elected officials, like our citizens, are entitled to fundamental fairness from state government agencies. When a person's job, standing in the community, and

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family life are at stake, a state agency which assumes the responsibility of accusing the official has a duty to be fair, and a duty to be circumspect. Criminal prosecutors have long understood this obligation as extending to every citizen, but particularly to those whose livelihoods depend upon election to public office. Unfortunately, the Citizen's Aide has assumed a prosecutorial function while eschewing traditional prosecutorial limitations.

I hope that this letter is of some help to you. I will be happy to discuss this with you at any time. Thank you for your interest in this matter.

Sincerely yours,

CORCORAN, SKIVER, ZITO,
DEKOTER & THOLE



Daniel E. DeKoter

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Collegiate Dictionary, 625 (1986), and "An official or semi official office to which people may come with grievances connected with the government. The Ombudsman stands between, and represents, the citizen before the government." Black's Law Dictionary, 979 (rev. 5th ed. 1979).

The Ombudsman is the citizens' aide in obtaining non-judicial relief from administrative actions of government with specified exceptions, an employment relationship, Iowa Code § 601G.9(1), any court or judge or appurtenant judicial staff, the Iowa General Assembly, the governor of Iowa or the governor's personal staff, or an interstate instrumentality Iowa Code § 601G.1(2) (a-d).

The Iowa Citizens' Aide/Ombudsman has testified that his office does not conduct adjudicatory hearings (T at 41), file criminal charges (T at 42), revoke a license or privilege (T at 42), hold contested case hearings (T at 43), issue any orders of any kind other than subpoenas (T at 43), determine or restrict the rights of an individual (T at 44), initiate the removal of any public official (T at 44), make a finding as to the employability of a person (T at 44), cause the termination of an employee except employees of the office (T at 44), does have access to confidential information (T at 44), has never granted contested case hearings under Chapter 17A (T at 49), that if a critical report is issued, the person criticized is provided the entire report (T at 53-54), that their response is attached unedited to the critical report (T at 54), and that he is not required to publish his policies and procedures in the administrative code, but does publish them there to inform the public and government officials (T at 54).

The Federal District Court in the Southern District of Iowa has recognized the unique function the Citizens' Aide/Ombudsman provides the citizens of Iowa and the need for the confidentiality of complaints made to the Citizens' Aide/Ombudsman. In Shabazz v. Scurr, 622 F.Supp. 90 (D. Iowa 1987) the family of a deceased inmate sought to call a former employee of the Citizens' Aide/Ombudsman as a witness in a "1983" claim against the State of Iowa. The court found that complaints received by the "...ombudsman are privileged because such confidentiality is necessary to ensure that complaints will be made." 622 F.Supp. at 92. In reaching that decision, the court noted that "the office cannot compel citizens and other whistle-blowers to come forward;

they must choose to do so. Thus, anything which chills a citizen's willingness to come forward limits the office's effectiveness in the long run and may restrict the spectrum of available information." 622 F.Supp. at 92.

The ombudsman function is also recognized in the Civil Service Reform Act of 1978 by the court in Frazier v. Merit Systems Protection Board, 672 F.2d 150 (D.C. Cir. 1982). The court interpreted the creation of the "...Special Counsel to act as an ombudsman responsible for investigating and prosecuting violations of the Act." 672 F.2d at 162. In deciding that the adjudicatory power of the Act rested in the Merit System Protection Board, the court agreed with the Board's contention "...that the authority of the Special Counsel extends only to investigation and prosecution and that all adjudicatory power is lodged in the Board itself." 672 F.2d at 613.

The ombudsman appointed to oversee the operation of the Duval County, Florida Jail only could receive and investigate the complaints and to report to jail administrators to seek solution to some problems. Miller v. Carson, 563 F.2d 741 (5th Cir. 1977).

Sheriff Rolfes' insistence that the Citizens' Aide/Ombudsman conduct a contested case hearing is inconsistent with the general understanding of what an ombudsman's function is.

Sheriff Rolfes' observation that §§601G.8 and .9(2) allow the Citizens' Aide/Ombudsman to conduct an evidentiary hearing is incorrect. When Sheriff Rolfes proceeds to the assumptions that the Citizens' Aide/Ombudsman's investigation requires "contested case procedures" and that if a State agency is subject to 17A, it is required to comply with contested case procedures is not well founded. His reliance on Polk County v. Iowa State Appeal Board, 330 N.W.2d 267 (Iowa 1983) ignores that in the court's holding the court stated, "The result of our conclusion that this is not a contested case is that the procedural requirements of sections 17A.10-.17 and .19 do not apply." 330 N.W.2d at 277. In reaching their conclusion, the court recognized that the "...initial inquiry, therefore, must be whether the hearing provided by section 24.28 is required by the constitution or a statute to be an evidentiary hearing." 330 N.W.2d at 277 citing Estabrook v. Iowa Civil Rights Commission, 283 N.W.2d 306, 308 (Iowa 1979).

Here, as there, the initial inquiry of the Court is whether the constitution or statute (601G.8) requires an evidentiary hearing. And if an evidentiary hearing is required, what expectancy Sheriff Rolfes has in some protected right.

Sheriff Rolfes' reliance on some contested case procedures as detailed in Iowa Code §17A.12-15 is misplaced. As previously stated, the Citizens' Aide/Ombudsman's position is that Chapter 17A does not apply to the Citizens' Aide/Ombudsman office. However, even if Chapter 17A does apply to the Citizens' Aide/Ombudsman office, the controversy before the Citizens' Aide/Ombudsman is not a contested case. Assuming arguendo that the Citizens' Aide/Ombudsman's Office is an agency as defined by 17A.2(1) and (2), and therefore Chapter 17A does apply to the Citizens' Aide/Ombudsman, the matters under inquiry with respect to Sheriff Rolfes are not a "contested case" as defined in Iowa Code §17A.2(2). In Kohorst v. Iowa State Commerce Commission, 348 N.W.2d 619 (Iowa 1984), where a landowner sought judicial review of a commerce commission decision to grant franchise for electrical transmission lines over landowner's property, the Court held that "When a statute requires that rights be determined by the agency after an opportunity for an evidentiary hearing has been provided, the proceedings are classified as a 'contested case'". In Oliver v. Teleprompter Corporation, 299 N.W.2d 683 (Iowa 1980) the Court determined that "Neither the constitution nor the statutes require the opportunity for an evidentiary hearing for probable cause determination", quoting Estabrook v. Iowa Civil Rights Commission, 283 N.W.2d 306, 308, 311 (Iowa 1979). The court in Estabrook, in holding that the commission's probable cause function is not a 17A.12 contested case, considered that the requirements of procedural due processes apply only to the deprivation of interest encompassed by the fourteenth amendment's protection of liberty and property. 283 N.W.2d at 309.

In Zwingle Independent School District v. State Board of Public Instruction, 160 N.W.2d 299 (Iowa 1968), the Court observed "...it is well established administrative bodies may act within the limits of their legislative authority without giving notice or providing a hearing unless the statute so requires or unless some constitutional right is transgressed thereby." Sheriff Rolfes has failed to show which constitutional right or rights is transgressed by the Citizens' Aide/Ombudsman's investigation of his office. Sheriff Rolfes has also

failed to provide another basis for his demand for an evidentiary contested case hearing and an opportunity to confront and cross-examine witnesses.

Therefore, if a hearing is not required by either constitution or statute because the Citizens' Aide/Ombudsman is not determining the rights of Sheriff Rolfes, and since the Citizens' Aide/Ombudsman is not conducting an evidentiary hearing, the proceedings are more likely to be termed "other agency action" by Chapter 17A. See Allegre v. Iowa State Board of Regents, 349 N.W.2d 112 (Iowa 1984).

Sheriff Rolfes would turn the CA/O investigation into an adjudicatory process. Chapter 601G of the Iowa Code creates the office of the Citizens' Aide/Ombudsman and sets forth the structure, powers, duties, and responsibilities of the Citizens' Aide/Ombudsman. Iowa Code §601G.

The controlling case in this matter is Hannah v. Larche, 363 U.S. 420, 80 S.Ct. 1502 (1960). In Hannah, the U.S. Supreme Court was faced with determining what procedural due process rights should be afforded to an individual or individuals under investigation by the U.S. Civil Rights Commission. 363 U.S. at 421-430, 80 S.Ct. at 1502-1508.

In Hannah, the U.S. Civil Rights Commission commenced an investigation as a result of, "Sixty-seven complaints from individual negroes who alleged that they had been discriminatorily deprived of their right to vote". 363 U.S. at 423, 80 S.Ct. at 1505.

The U.S. Civil Rights Commission served subpoenas duces tecum on various individuals as a result of their investigation and those subpoenas were resisted by the subjects of the Commission's investigation. 363 U.S. at 426-428, 80 S.Ct. at 1506-1507.

The Commission met with resistance during their investigation and after an exchange of correspondence between the Commission and the individuals the Commission was attempting to investigate, a hearing was scheduled and subpoenas were issued ordering the subjects of the investigation, "to appear at the hearing and to bring with them various voting and registration records within their custody and control". 363 U.S. at 426, 80 S.Ct. at 1506. Subpoenas were also served upon private individuals, "to explain their activities with regard to alleged deprivations of negro voting rights". 363 U.S. at 426, 80 S.Ct. at 1506.

The subjects that had been subpoenaed by the Civil Rights Commission filed complaints with the District Court for the Western District of Louisiana alleging:

That the respondents would suffer irreparable harm by virtue of the commissions refusal to furnish the names of persons who had filed allegations of voting deprivations, as well as the contents of the allegations, and by its further refusal to permit the respondents to confront and cross-examine the persons making such allegations. In addition, both complaints alleged that the commissions refusals not only violated numerous provisions of the federal constitution, but also constituted "ultra vires" acts not authorized either by congress or the chief executive.

363 U.S. at 427, 80 S.Ct. at 1507.

The subjects and individuals subpoenaed also sought a temporary restraining order and permanent injunction to prohibit the members of the U.S. Civil Rights Commission from compelling their testimony until the Commission provided them with copies of the sworn charges as well as the identities of the individuals that had complained to the Civil Rights Commission. 363 U.S. at 427, 80 S.Ct. at 1507. The individuals that had been subpoenaed by the Civil Rights Commission claimed that they had a constitutional right to confront their accusers and to "know the nature and character of the charges made against them and to be represented by counsel". 363 U.S. at 428, 80 S.Ct. at 1507.

The Federal District Court found in favor of the subjects that had been subpoenaed and agreed with them that they "would suffer irreparable harm if the hearings were held as scheduled". 363 U.S. at 428, 80 S.Ct. at 1507.

Ultimately, the U.S. Supreme Court decided the issue and found in favor of the U.S. Civil Rights Commission holding that the individuals summoned to testify and produce documents before the Commission were not entitled to confront and cross-examine their accusers. 363 U.S. at 440-453, 80 S.Ct. at 1513-1520. The analysis applied to the Civil Rights investigation in Hannah is the appropriate and controlling authority for the investigation being conducted by the Citizens' Aide/Ombudsman's office.

The Court in Hannah, identified the duties of the Civil Rights Commission as:

- (1) Investigating written, sworn allegations that anyone has been discriminatorily deprived of his right to vote;
- (2) studying and collecting information "concerning legal developments constituting a denial of equal protection of the laws under the constitution"; and
- (3) reporting to the president and congress on its activities, findings, and recommendations.

363 U.S. at 440, 80 S.Ct. at 1514.

Iowa Code § 501C.11 of the Iowa Code sets forth the "Subjects for Investigation" for the Citizens' Aide/Ombudsman's office. The code the Iowa Code provides:

An appropriate subject for investigation by the office of the Citizens' Aide/Ombudsman is an administrative action that might be:

1. Contrary to law or regulation.
2. Unreasonable, unfair, oppressive, or inconsistent with the general course of an agency's functioning, even though in accordance with law.
3. Based on a mistake of law or arbitrary in ascertainties of fact.
4. Based on improper motivation or irrelevant consideration.
5. Unaccompanied by an adequate statement of reasons. The citizens' aide may also be concerned with strengthening procedures and practices which lessen the risk that objectionable administrative actions will occur.

Iowa Code § 601G.16 of the Iowa Code states:

If, having considered a complaint and whatever material the citizens' aide deems pertinent, the citizens' aide finds substantiating facts that:

1. A matter should be further considered by the agency;
2. An administrative action should be modified or canceled;
3. A rule on which an administrative action is based should be altered;
4. Reasons should be given for an administrative action; or
5. Any other action should be taken by the agency, the citizens' aide shall state the recommendations to the agency. If the citizens' aide requests, the agency shall, within twenty working days notify the citizens' aide of any action taken on the recommendations or the reasons for not complying with them. If the citizens' aide believes that an administrative action has occurred because of laws of which results are unfair or otherwise objectionable, the citizens' aide shall notify the general assembly concerning desirable statutory change.

Like the U.S. Civil Rights Commission, the Citizens' Aide/Ombudsman's office investigates complaints by citizens, and reports to the appropriate legislative body.

Subsequent to its review of the statutory duties of the U.S. Civil Rights Commission, the Court in Hannah concluded that the U.S. Civil Rights Commission was "purely investigative and fact finding" as opposed to an adjudicatory agency. 363 U.S. at 441, 80 S.Ct. at 1514. The Court in Hannah stated:

As is apparent from this brief sketch of the statutory duties imposed upon the commission, its function is purely investigative and fact finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for a legislative or executive action.

363 U.S. at 440-441, 80 S.Ct. at 1514.

Like the Civil Rights Commission, the Citizens' Aide/Ombudsman's office does not adjudicate, does not hold trials or determine anyone's civil or criminal liability, does not issue orders, does not indict, punish or impose any legal sanctions, does not make determinations depriving anyone of his life, liberty or property and does not and cannot take any affirmative action which will affect an individual's legal rights.

Chapter 601G of the Iowa Code allows the Citizen's Aide/Ombudsman to "publish the conclusions, recommendations, and suggestions and transmit them to the governor, the general assembly or any of its committees". Iowa Code §601G.17.

The Citizens' Aide/Ombudsman may also issue a criticism of an agency or any officer or employee of a governmental agency, but only after providing the agency, officer or employee a copy of the proposed criticism and allowing the agency or individual criticized to respond. Iowa Code §§601G.15 & 17.

The Citizens' Aide/Ombudsman is also required to attach the unedited response of the individual being criticized by the Citizens' Aide/Ombudsman's to the critical report. Iowa Code §§601G.15 & .17.

In Hannah, the U.S. Supreme Court specifically considered "whether persons whose conduct is under investigation by a governmental agency of this nature are entitled, by virtue of the due process clause, to know the specific charges that are being investigated, as well as the identity of the complainant, and to have the right to cross-examine those complainants and other witnesses". 363 U.S. at 441-442, 80 S.Ct. at 1514.

The Court in Hannah concluded that a person under investigation by the U.S. Civil Rights Commission was not entitled to know the specific charges being investigated or the identity of the complainants or the right to cross-examine the complainants and other witnesses during the investigative stage. 363 U.S. at 441-442, 80 S.Ct. at 1514.

The Court in Hannah stated:

When governmental action does not partake of an adjudication, as for example, when a general fact finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with different types of proceedings. Whether the constitution requires that a particular right obtained in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and

the possible burden on that proceeding, are all considerations which must be taken into account. An analysis of these factors demonstrates why it is that the particular rights claimed by respondents need not be conferred upon those appearing before purely investigative agencies, of which the commission of civil rights is one.

363 U.S. at 442-443, 80 S.Ct. at 1514-1515.

The Court in Hannah concluded that "since the Commission does not adjudicate it need not be bound by adjudicatory procedures". 363 U.S. at 442, 80 S.Ct. at 1515.

The individuals who were subpoenaed before the Commission in Hannah and were subjects of the investigation claimed that the Commission's proceedings "might irreparably harm those being investigated by subjecting them to public opprobrium and scorn, the distinct likelihood of losing their jobs, and the possibility of criminal prosecutions". 363 U.S. at 442-443 and 80 S.Ct. at 1515.

The Court in Hannah pointed out that there was nothing in the record before them that convinced them that the subjects of the investigation and those being subpoenaed before the Commission had or would be harmed by the investigation and further stated "however, even if such collateral consequences were to flow from the commission's investigations, they would not be the result of any affirmative determination made by the Commission, and they would not affect the legitimacy of the Commission's investigative function". 363 U.S. at 443, 80 S.Ct. at 1515.

During the hearing held in Polk County District Court on December 21, 1988, Sheriff Rolfes offered no evidence that he had, in fact, suffered any harm or stigma as a result of the Citizens' Aide/Ombudsman investigation. Following the Court's reasoning in Hannah, Sheriff Rolfes would stand in no different light than a subject under investigation by the U.S. Civil Rights Commission and, therefore, no constitutionally protected rights would be harmed by any affirmative determination made by the Citizens' Aide/Ombudsman's office.

The Court in Hannah anticipated the unrealistic claims by the subjects under investigation by the Commission and cautioned that:

The investigative process could be completely disrupted if investigative hearings were transformed into trial-like proceedings, and if persons who might be indirectly affected by an investigation were given an absolute right to cross-examine every witness called to testify. Fact-finding agencies without any power to adjudicate would be diverted from their legitimate duties and would be plagued by the injection of collateral

issues that would make the investigation interminable. Even a person not called as a witness could demand the right to appear at the hearing, cross-examine any witness whose testimony or sworn affidavit allegedly defamed or incriminated him, and call an unlimited number of witnesses of his own selection. This type of proceeding would make a shambles of the investigation and stifle the agency in its gathering of facts.

363 U.S. at 443, 80 S.Ct. at 1515.

In U.S. v. Callandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), the court discussed the power of the grand jury and the application of constitutional rights to its proceedings. The court characterized the grand jury as both the discoverer and presenter for trial of suspected criminals and the protector of citizens from arbitrary and oppressive governmental action. The court described the wide latitude accorded a grand jury and the lack of restraint governing its conduct.

A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated. Rather, it is an investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person. The grand jury's investigative powers must be broad if its public responsibility is adequately to be discharged.

414 U.S. at 343-44, 94 S.Ct. at 618 citing Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1976) ; Costello v. U.S., 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956).

The court cited Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962) in stating "...When the grand jury is performing its investigatory function into a general problem area ... society's interest is best served by a thorough and extensive investigation." 414 U.S. at 344, 94 S.Ct. at 618.

The Iowa Supreme Court applied the views stated in U.S. v. Callandra, in explaining the history of the grand jury system and it's generally unrestrained operation. See State v. Paulsen, 286 N.W.2d 157 (Iowa 1979).

These cases support the premise that in some instances a person's rights must be balanced with the public policy interest of an efficient mechanism to address the public's grievances. Sheriff Rolfes' right to confront and cross examine his accusers does not apply in purely investigatory proceedings. The Citizens' Aide/Ombudsman is conducting an investigation of the allegations against Sheriff Rolfes like that of a grand jury to determine what action the Citizens' Aide/Ombudsman should take. But the actions the Citizens' Aide/Ombudsman can take does not include an adjudication of the facts or an

order removing Sheriff Rolfes from office or applying a penalty to him. The most the Citizens' Aide/Ombudsman can do is refer to the appropriate authorities for disciplinary proceedings and issue a critical report.

The stifling and disruption of a legitimate investigation that the Supreme Court in Hannah warned of is exactly what Sheriff Rolfes is attempting to do in the case at hand.

As indicated during the oral testimony of Sheriff Rolfes on December 21, 1988, he received the subpoena issued by the Citizens' Aide/Ombudsman on June 9, 1988. (T at 11-12). Unfortunately, the investigation being conducted by the Citizens' Aide/Ombudsman's office has been disrupted and stifled by Sheriff Rolfes' refusal to honor his subpoena.

Certainly, Sheriff Rolfes can exercise his fifth amendment privilege against self incrimination in the event he elects to do so. However, Sheriff Rolfes should be compelled to comply with the subpoena and present himself. Once Sheriff Rolfes complies with the subpoena and presents himself, he may then assert his right against self incrimination if he chooses to do so. Just as the Supreme Court in Hannah predicted could happen, a fact-finding agency that does not have the power to adjudicate, the Citizens' Aide/Ombudsman, has been diverted from its legitimate duty of gathering the facts and instead has had to deal with collateral issues.

The Court in Hannah compared the U.S. Civil Rights Commission investigation to that of an investigation being conducted by a legislative committee, administrative regulatory agencies, the Federal Trade Commission, the Securities and Exchange Commission, the Presidential Commission, the Tariff Commission, and a grand jury investigation. 363 U.S. at 444-453, 80 S.Ct. 1516-1520. The Court in Hannah clearly concluded that when these various governmental agencies and grand juries are involved in investigations and fact gathering, the right to confront and cross-examine witnesses appearing before those agencies and investigative bodies does not attach. 363 U.S. at 444-453, 80 S.Ct. 1516-1520.

The purpose and function of the Citizens' Aide/Ombudsman is analogous to these investigative agencies and bodies and to permit Sheriff Rolfes or anyone being investigated by the Citizens' Aide/Ombudsman's office the right to confront and cross-examine witnesses providing testimony or evidence to the

Citizens' Aide/Ombudsman serves no purpose other than to thwart the legitimate goal of the Citizens' Aide/Ombudsman's office to gather facts.

The Citizens' Aide/Ombudsman's office has no authority to initiate a criminal prosecution against any person or agency. In the event the Citizens' Aide/Ombudsman believes that any public official, employee or other person has engaged in conduct that would warrant criminal or disciplinary proceedings, he is required to refer the "matter to the appropriate authorities". Iowa Code §601G.19.

Iowa Code §601G.9 sets forth the powers of the Citizens' Aide/Ombudsman. The Legislature has provided the Citizens' Aide/Ombudsman's office with the authority to "issue a subpoena to compel any person to appear, give sworn testimony, or produce documentary or other evidence relevant to a matter under inquiry". Iowa Code §601G.9(4). The Iowa Legislature has also provided that the "citizens' aide, deputies, and assistants of the citizens' aide may administer oaths to persons giving testimony before them". Iowa Code §601G.9(4). Additionally, Chapter 601G.9 provides:

If a witness either fails or refuses to obey a subpoena issued by the citizens' aide, the citizens' aide may petition the district court having jurisdiction for an order directing obedience to the subpoena. If the court finds that the subpoena should be obeyed, it shall enter an order requiring obedience to the subpoena, and refusal to obey the court order is subject to punishment for contempt.

Iowa Code §601G.9(4).

Clearly, the Citizens' Aide/Ombudsman and his assistants have complied with the provisions set forth in Iowa Code § 601G of the Iowa Code and are entitled to the enforcement of their lawfully issued subpoena to Sheriff Rolfes. As stated before, Sheriff Rolfes, certainly, has the privilege of exercising his fifth amendment right against self incrimination once he complies with the subpoena and presents himself before the Citizens' Aide/Ombudsman or one of his assistants as directed.

Interestingly, Sheriff Rolfes' testimony concerning the conduct of the representatives of the Citizens' Aide/Ombudsman's office during their "on-site inspection" of the Osceola County Sheriff's office and jail facility was based entirely upon hearsay as Sheriff Rolfes admitted that he was not present during the "on site" inspection complained of, and has no personal knowledge of that "on-site inspection". (T at 20-21). Additionally, when Sheriff Rolfes was

serve. In order to obtain his sworn testimony, Sheriff Rolfes himself admits that he initially agreed to comply with the subpoena. (T at 22-23). When Sheriff Rolfes arrived at the designated place and at the designated time he was accompanied by the Osceola County Attorney and his private attorney. (T at 22-23). The representatives of the Citizens' Aide/Ombudsman's office cooperated with Sheriff Rolfes and agreed to give him additional time to comply with the subpoena so he could consult with his attorney and formalize his sworn statement. (T at 22-23).

Sheriff Rolfes alleges the deprivation or "possible deprivation" of a liberty or property interest as a result of the investigation being conducted by the Citizens' Aide/Ombudsman's office. Specifically, Sheriff Rolfes believes that his standing and association in the community and his position as Sheriff of Osceola County as well as his freedom of employment will be irreparably harmed by the investigation being conducted by the Citizens' Aide/Ombudsman's office. (T at 18-19).

Sheriff Rolfes' allegation that he has or will suffer irreparable harm as a result of the Citizens' Aide/Ombudsman's investigation is without merit. Sheriff Rolfes testified during the hearing on December 21, 1988 that he easily won the primary election in June of 1988 and easily won the general election in November of 1988 by a margin of 2 to 1 against his opponent. (T at 25). Sheriff Rolfes would have the Court believe that the newspaper articles (Exhibits H,I,M,N,O,P & Q) are somehow as the result of the Citizens' Aide/Ombudsman's office communicating with the news media. William P. Angrick II, in his testimony, made it clear that neither he nor any of his assistants have discussed the substantive issues of this investigation with the news media. (T at 53). Mr. Angrick testified that "only the fact that an investigation is being conducted and the status of various aspects of that investigation" have been discussed with the news media. (T at 53) Certainly, the Citizens' Aide/Ombudsman's office is not and cannot be held responsible for any information provided to the news media by private citizens or individuals within the community of Osceola County not connected with or governed by the laws of 601G or the rules and regulations as set forth by the Citizens' Aide/Ombudsman's office to govern his office and employees.

While the Citizens' Aide/Ombudsman's Office disagrees with Sheriff Rolfe that he has or will suffer irreparable harm as a result of this investigation, even if he was correct in his assumption, Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155 (1976) is dispositive of this issue.

In Paul v. Davis, the chief of the Jefferson County Kentucky Police Department and the City of Louisville Police Department prepared a flyer identifying numerous subjects known to them to be active in shoplifting activity in their area. 424 U.S. at 695-696, 96 S.Ct. 1157, 1158.

The flyer containing the names of the "shoplifters" was distributed to the business community in the Louisville, Kentucky vicinity. 424 U.S. at 695, 96 S.Ct. at 1158.

Edward Charles Davis III was one of the individuals identified on the flyer by the law enforcement officers. Mr. Davis had been arrested for shoplifting prior to the preparation of the flyer. 424 U.S. at 695, 96 S.Ct. at 1158. At the time the flyer containing Mr. Davis' name was disseminated to the business community, he had not been tried for the shoplifting offense. Additionally, after the flyer had been circulated the charge of shoplifting was dismissed against Mr. Davis. 424 U.S. at 695-696, 96 S.Ct. 1158.

Mr. Davis was employed as a photographer with the Louisville Courier-Journal and Times when the flyer was circulated containing his name as an active shoplifter. 424 U.S. at 696, 96 S.Ct. at 1158. Mr. Davis' supervisor apparently saw the flyer containing Mr. Davis' name and confronted Mr. Davis about his name being on the flyer and wanted to hear what Mr. Davis had to say about the events which led to his inclusion in the flyer. 424 U.S. at 696, 96 S.Ct. at 1158. The supervisor that confronted Mr. Davis about his inclusion on the flyer served as the Executive Director of Photography for both the Louisville Courier-Journal and Times. After Mr. Davis discussed his inclusion on the flyer, he (Davis) was informed by his supervisor that he would not be fired, but "he 'had best not find himself in a similar situation' in the future". 424 U.S. at 696, 96 S.Ct. at 1158.

Davis alleged that the law enforcement officers had violated his constitutional rights and deprived him of some "liberty" interest which was protected by the fourteenth amendment by labeling him as an active shoplifter and including him in the flyer. 424 U.S. at 697, 96 S.Ct. at 1159. Davis claimed

that by his being designated as an active shoplifter he would be inhibited from "entering business establishments for fear of being suspected of shoplifting and possibly apprehended, and would seriously impair his future employment opportunities". 424 U.S. at 697, 96 S.Ct. at 1159.

The Court in Paul v. Davis held that the defamatory publications (the flyer with Davis' name included as a shoplifter) "however seriously they may have harmed respondent's [Davis] reputation, did not deprive him of any 'liberty' or 'property' interest protected by the due process clause". 424 U.S. at 712, 96 S.Ct. at 1166.

In reaching the conclusion that Davis did not have a protected liberty or property interest, the Court stated that it "has never held that the mere defamation of an individual, whether by branding him disloyal or otherwise, was sufficient to invoke the guarantees of procedural due process absent an accompanying loss of government employment. 424 U.S. at 706, 96 S.Ct. at 1163.

The Court distinguished its prior holding of Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507 (1971) in which the Court held that a Wisconsin statute which authorized the "posting" of individuals names who had been determined by the law enforcement community to be hazards to themselves or to their family or to the community at large by their "excessive drinking" habits was unconstitutional because it failed to "provide procedural safeguards of notice and an opportunity to be heard prior to an individual's being 'posted'". 424 U.S. at 707, 96 S.Ct. at 1163.

The Court in Paul v. Davis, noted the language in Constantineau, "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential". 424 U.S. at 708, 96 S.Ct. at 1164, citing Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510 (1971). The Court in Paul v. Davis discussed the meaning of "because of what the government is doing to him" and concluded that that language "referred to the fact that the governmental action taken in that case (Wisconsin v. Constantineau) deprived the individual of a right previously held under state laws -- the right to purchase or obtain liquor in common with the rest of the citizenry". 424 U.S. at 708, 96 S.Ct. at 1164.

The Court in Paul v. Davis continued their analysis of Wisconsin v. Constantineau and stated that "in Wisconsin v. Constantineau the "posting",

therefore, significantly altered his status as a matter of state law and it was that alteration of a legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards. The "stigma" resulting from the defamatory character of the posting was doubtless an important factor in evaluating the extent of harm worked by that act, but we do not think that such defamation, standing alone, deprived Constantineau of any 'liberty' protected by the procedural guarantees of the fourteenth amendment". 424 U.S. at 708-709, 96 S.Ct. at 1164.

The Court in Paul v. Davis discussed their prior holdings in Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215 (1952); Joint Anti-fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S.Ct. 624 (1952); and United States v. Lovitt, 328 U.S. 303, 66 S.Ct. 1073 (1946). In their discussion of these cases, the Court pointed out that in these cases the governmental action was the primary factor in their ability to distinguish those case from Paul v. Davis. 424 U.S. at 705-710, 96 S.Ct. at 1162-1166.

In the present case before the Court, the Citizens' Aide/Ombudsman's office can impose no sanctions or deprive Sheriff Rolfes of his ability to serve as Sheriff or affirmatively interfere with his present or future employment potential. In the event the Citizens' Aide/Ombudsman believes that Sheriff Rolfes has acted in a manner that would warrant criminal or disciplinary action, the Citizens' Aide/Ombudsman is required to refer the matter to the appropriate authorities. Iowa Code, §601G.19.

It is Sheriff Rolfes that is unwilling to cooperate and provide his version of his activities as Sheriff. It is not the Citizens' Aide/Ombudsman's office that is refusing to hear his version or allow him the opportunity to present his version. Certainly, the Citizens' Aide/Ombudsman office is not only willing but is eager to provide Sheriff Rolfes with an opportunity to explain his conduct in regard to the various allegations received from the public. The willingness to hear Sheriff Rolfes' version has been demonstrated by the subpoena Sheriff Rolfes is resisting.

Additionally, in the event that the Citizens' Aide/Ombudsman's office would take a position that would criticize Sheriff Rolfes, Sheriff Rolfes would be provided with the criticism of him and be allowed to provide documents and

written statements contradicting the Citizens' Aide/Ombudsman's findings and putting forth his (Rolfes) version of any conduct discussed. Iowa Code §601G.15.

The Court in Paul v. Davis discussed its prior holding in Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972), in which the Court recognized that governmental action which defamed an individual in the course of declining to rehire that individual could entitle that person to notice and an opportunity to be heard as to the defamation. 424 U.S. at 709, 96 S.Ct. at 1164 discussing Board of Regents v. Roth.

The Court in Paul v. Davis went on to note, however, that the language in Roth "is quite inconsistent with any notion that a defamation perpetrated by a government official but unconnected with any refusal to rehire would be actionable under the fourteenth amendment" ... "The state, in declining to rehire the respondent did not make any charge against him (Roth) that might seriously damage his standing and associations in his community.

"... 'similarly, there is no suggestion that the state in declining to re-employ the respondent (Roth) imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. 424 U.S. at 709-710, 96 S.Ct. at 1164 discussing the Board of Regents v. Roth case. The Court in Paul v. Davis also discussed its prior holding in Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729 (1975) in which students were suspended from school due to misconduct charges without adequate notice of hearing. The Court noted in its holding in Paul v. Davis, that the holding in Paul v. Davis was consistent with its prior holding in Goss v. Lopez and noted that although the suspension from school required the guarantees of notice of hearing pursuant to the fourteenth amendment, the Court in Goss v. Lopez "took care to point out that Ohio law conferred a right upon all children to attend school, and that the act of the school official suspending the students there involved resulted in a denial or deprivation of that right". 424 U.S. at 710, 96 S.Ct. at 1165.

In the case at hand involving the investigation by the Citizens' Aide/Ombudsman's office of Sheriff Rolfes, there is no possibility that the State Ombudsman's office can cause the removal of Sheriff Rolfes from his office nor cause him to be terminated from his position as Sheriff as the Citizens' Aide/Ombudsman's office is without authority to accomplish such

feats. In the event the Citizens' Aide/Ombudsman's office believes such proceedings are appropriate, pursuant to §601G.19, the Citizens' Aide/Ombudsman's office would refer the matter to the appropriate authorities. At that time, the appropriate authorities would make a determination as to whether or not to proceed with such an action; it would not be the Citizens' Aide/Ombudsman's office initiating or conducting those proceedings. Iowa Code §66.3 sets forth who may file petitions for removal of public officers and in the case of Sheriff Rolfes either the Iowa Attorney General or the Osceola County Attorney where the duties of the Sheriff are performed would be the appropriate authority to initiate removal proceedings.

No where is the Citizens' Aide/Ombudsman authorized to initiate removal proceedings of any elected or appointed official in the state of Iowa. The decision to initiate such an action against an appointed or elected official by the appropriate authority would be independent of any conclusion or finding reached by the Citizens' Aide/Ombudsman office. An independent judicial proceeding before an Iowa Court is required to effectuate a removal from office. As stated before, the Citizens' Aide/Ombudsman's office does not adjudicate a person's rights, deprive an individual of their rights or property, does not issue orders and does not hold contested case hearings to determine the rights, liberties, or privileges of any individual or entity.

The Court in Paul v. Davis pointed out that their prior holdings in cases where due process procedures were required, involved cases where the state action had "distinctly altered or extinguished" a "right or status previously recognized by state law". 424 U.S. at 711, 96 S.Ct. at 1165. The Citizens' Aide/Ombudsman's office is without power to "distinctly alter or extinguish" any "right or status previously recognized by state law" on behalf of Sheriff Rolfes.

The Court in Paul v. Davis concluded that harm or injury to a person's reputation alone "does not result in a deprivation of any "liberty" or "property" interest unless that liberty or property interest is recognized by state or federal law. 424 U.S. at 712, 96 S.Ct. at 1166.

In Green v. Decamp, 612 F.2d 368 (8th Cir. 1979) the Eighth Circuit Court of Appeals relying on Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155 (1976) concluded that members of a select committee of the Nebraska legislature had

not deprived a police chief of a property or liberty interest without due process by publicly criticizing his handling of a homicide investigation. Green v. Decamp, 612 F.2d at 369-372. In Green v. Decamp, eight state senators who were members of a select committee of the Nebraska legislature prepared and released a committee report which charged that William E. Green, the McCook, Nebraska Police Chief, knowingly and corruptly conducted an improper investigation of a possible murder. 612 F.2d at 369.

Chief Green initiated an action against the members of the select committee under 42 U.S.C. §1983 alleging that the members of the select committee had deprived him of a liberty or property interest protected by the due process clause of the fourteenth amendment for their public criticism of him. 612 F.2d at 369. The Eighth Circuit Court of Appeals concluded that Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155 (1976) was the controlling case in Green v. Decamp. After a careful analysis of Paul v. Davis and Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507 (1971) the Court rejected Wisconsin v. Constantineau as controlling and distinguished it from Paul v. Davis by finding Constantineau "involved a deprivation of a property interest protected by the fourteenth amendment, because it 'deprived the individual of a right previously held under state law -- the right to purchase or obtain liquor'". 612 F.2d at 370, citing Paul v. Davis, 424 U.S. at 708, 96 S.Ct. at 1164. In Green v. Decamp, the Eighth Circuit Court of Appeals stated that they were unable to find such a right or interest vested in Chief Green. 612 F.2d at 370.

The Eighth Circuit Court of Appeals in Green v. Decamp also distinguished Jenkins v. McKeithen, 395 U.S. 411, 89 S.Ct. 1843 (1969) which required that due process attach to the action of a select committee which was established to expose violations of criminal laws by specific individuals. Green v. Decamp, 612 F.2d at 370. The Court in Green v. Decamp, relying on Hannah v. Larche, 363 U.S. 420, 80 S.Ct. 1502 (1960) distinguished the facts in Green v. Decamp from Jenkins v. McKeithen and pointed out that the Nebraska select committee "made no actual findings that Green was guilty of a crime, but instead reached conclusions concerning local police practices, which were clearly identical to the committee's investigation of the state patrol". Green v. Decamp, 612 F.2 at 370. The Eighth Circuit Court of Appeals in Green v. Decamp, in their conclusion, distinguished the accusatory or adjudicative nature involved in

-- Jenkins v. McKeithen and pointed out that the select committee of the Nebraska legislature "was within the legislative authority in reaching its conclusions concerning Chief Green's investigation, and that those conclusions were not of the accusatory or adjudicative nature involved in Jenkins v. McKeithen". Green v. Decamp, 612 F.2d at 371.

Iowa Code § 601G.11 sets forth the subjects for investigations by the Citizens' Aide/Ombudsman's office. Clearly, the Citizens' Aide/Ombudsman's office is not limited to looking for criminal violations such as the select committee in Jenkins v. McKeithen. The Citizens' Aide/Ombudsman's office is most similar to the select committee of the Nebraska legislature in Green v. Decamp. The Eighth Circuit Court of Appeals in Reposa v. Meade School District 46-1, 790 F.2d 1349 (8th Cir. 1986), again had the opportunity to discuss procedural due process and its application to an interest in liberty or an interest in property when a nontenured school teacher brought an action under 42 U.S.C. §1983 against the school board for her transfer to another school in the same district which she claimed violated her constitutional rights of due process and freedom of speech.

The Eighth Circuit Court of Appeals discussed Michele Reposa's allegations that her reputation had been damaged and her employment prospects impaired by various written complaints in her personnel file. 790 F.2d at 1354. Michele Reposa claimed a liberty interest in her reputation which she claimed required notice and an opportunity to be heard. 790 F.2d at 1354. The Eighth Circuit Court of Appeals discussed the U.S. Supreme holding in Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972) which supports a nontenured public school teacher's entitlement to procedural due process only if the administrative action deprives the teacher of an interest in liberty or an interest in property. Reposa v. Meade School District 46-1, 790 F.2d at 1353, citing Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972) and Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694 (1972).

The Eighth Circuit Court of Appeals in Reposa pointed out that the Supreme Court in Roth "held that notice and hearing are required if the government imposes a 'stigma or other disability' that damages a person's standing in the community or forecloses a person's 'freedom to take advantage of other employ-

ment opportunities'". Reposa, 790 F.2d at 1354 citing Roth, 408 U.S. at 573, 92 S.Ct. at 2707. The Eighth Circuit Court of Appeals in Reposa held that Reposa "did not establish that her speech was protected, nor that she had a property interest or liberty interest" and affirmed the lower court's summary judgment for the Meade School District. Reposa, 790 F.2d at 1354. The Eighth Circuit Court of Appeals pointed out that "a statement that is basically one alleging conduct that fails to meet professional standards is a statement which does not infringe upon a liberty interest". Reposa, 790 F.2d at 1354 citing Norbeck v. Davenport Community School District, 545 F.2d 63, 69 (8th Cir. 1976), cert. denied 431 U.S. 917, 97 S.Ct. 2179 (1977).

As stated previously, the Citizens' Aide/Ombudsman's office has no authority to transfer, reassign or terminate Sheriff Rolfe in his employment. Under the logic of Reposa, a statement by the Citizens' Aide/Ombudsman that is alleging conduct that fails to meet professional standards would not infringe upon a liberty interest. Reposa, 790 F.2d at 1354.

In United States v. Fort, 443 F.2d 670, (D.C. Cir. 1970), cert. denied 403 U.S. 932, 91 S.Ct. 2255 (1971), the Circuit Court of Appeals for the District of Columbia dealt with the right to confront witnesses in an investigatory proceeding as opposed to a judicial proceeding. Fort came to the Court's attention after a permanent subcommittee on investigations of the senate committee on government operations commenced an investigation and was in the process of holding hearings on the subject of riots and civil disorders in the United States during the summer of 1968. 443 F.2d at 673.

A subpoena was issued to Jeff Fort directing him to appear before the subcommittee in Washington D.C. to offer testimony. 443 F.2d at 673. Fort's attorney acknowledged receipt of the subpoena and demanded that the committee direct each person who had made statements or presented evidence before the committee, either orally or in writing, which tended to defame Mr. Fort be compelled to personally appear before the subcommittee and be confronted personally by Fort and his attorney. 443 F.2d at 674. Fort, through his attorney also demanded that his attorney be permitted to personally orally cross-examine the aforementioned individuals. 443 F.2d at 674. Fort also demanded the right to present additional evidence concerning those individuals that had already presented statements and evidence to the committee. 443 F.2d at 674.

The committee agreed that Fort's first request to personally confront witnesses would be granted at the discretion of the committee upon Fort's request for a given witness. Fort's second request to have his counsel cross-examine those individuals was denied and a ruling on Fort's request to present additional evidence concerning the individuals who had already provided evidence and testimony to the committee was deferred until after Fort had testified. 443 F.2d at 674. When Fort appeared before the committee after responding to the question calling for his name, Fort's counsel "interjected that he must instruct his client not to participate further in the proceedings without the right to cross-examination". 443 F.2d at 674. The chairman of the committee denied this request and Fort was again asked to state his address at which time Fort and his counsel withdrew from the hearing room. 443 F.2d at 674.

A decision was made by the committee to certify these facts to the United States Attorney for the District of Columbia so that Jeff Fort might be proceeded against as provided by law. 443 F.2d at 674. Fort was later indicted for contempt by a grand jury in the District of Columbia and brought to trial. 443 F.2d at 674.

Fort was subsequently convicted on two counts of contempt and appealed his conviction to the Court of Appeals. 443 F.2d 675-676. On appeal, Fort argued, inter alia, that the committee was in error when it refused to grant him the right to confront and cross-examine those who had previously testified or given evidence to the committee during its investigation. 443 F.2d at 676.

Fort alleged that the committee "erroneously withheld his constitutional rights to confront and cross-examine those who had allegedly defamed him and to introduce evidence in his own behalf, and that his refusal to testify was thereby justified". 443 F.2d at 678.

The Court in U.S. v. Fort stated, "which constitutional rights are applicable depends on the nature and consequences of the governmental action". 443 F.2d at 678 citing Hannah v. Larche, 363 U.S. 420, 442, 80 S.Ct. 1502 (1960). The Court pointed out that "certain protections of the constitution may rightfully be claimed by a witness called to testify before a congressional subcommittee, such as the right not to incriminate himself, the right to be free from unreasonable searches and seizures and the right not to have his

First Amendment freedoms abridged. 443 F.2d at 678 citing Watkins v. United States, 354 U.S. 178, 187-188, 77 S.Ct. 1173 (1957).

The Court in Fort went on to consider Fort's right to confront and cross-examine witnesses before the committee. The Court in concluding that Fort did not have the right to confront and cross-examine his accusers before the committee stated:

However, when we consider the rights requested here by the appellant, we are dealing with an entirely different matter. The right to present evidence in one's own behalf and to confront and cross-examine one's accusers are rights designed to protect the individual's interest when the government seeks to impose criminal sanctions upon him. But the plain fact is that the congressional investigation with which we are here concerned is an investigative proceeding and not a criminal proceeding, and in such proceeding congress is not empowered to adjudicate criminal sanctions on the witness. These are the distinguishing features of a congressional investigation that cause such proceedings to be outside the guarantees of the due process clause of the fifth amendment and the confrontation right guaranteed in criminal proceedings by the sixth amendment.

U.S. v. Fort, 443 F.2d at 678-679.

The Court, in U.S. v. Fort, cited and referred to Hannah v. Larche as the controlling case concerning the facts before it in the Fort case.

On April 8, 1988, the Eighth Circuit Court of Appeals followed the U.S. Supreme Court's rationale of Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155 (1976) when they were faced with a claim by William H. Wade that the compilation and publication of a list of "survivalists" by the Arkansas State Police deprived him of his constitutional rights. Wade asserted that he had been slandered, denied due process and equal protection and suffered an invasion of privacy as well as a chilling effect on the exercise of his first amendment rights of speech and association. Wade v. Goodwin, 843 F.2d 1150, 1151 (8th Cir., 1988). In Wade v. Goodwin, Wade alleged "general harm to his reputation and that as a result of this harm he will be unable in the future to find employment or obtain credit". Id. at 1152. The Court in Wade stated "alleging speculative apprehensiveness as to future misuse of information resulting in direct harm is a subjective claim and [a]llegations of subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm". 843 F.2d 1150 at 1152 citing Laird v. Tatum, 408 U.S. 1, 13-14, 92 S.Ct. 2318, 2325-26 (1972).

Wade v. Goodman, Wade claimed that by the state including his name on the "survivalist list" the state "had ruined his reputation and had consequently deprived him of property and liberty rights without due process of law". 843 F.2d at 1152. Wade claimed that "he will find it impossible to make a living or obtain loans or credit". 843 F.2d at 1152. The Eighth Circuit Court of Appeals concluded that "one's reputation alone is neither a 'liberty' or a 'property' interest protectable by the due process clause of the fourteenth amendment". 843 F.2d at 1152 citing Paul v. Davis, 424 U.S. 693, 701-10, 96 S.Ct. 1155, 1160-65 (1976). The Court of Appeals concluded that since Wade did not have a right previously held under state law that his interest was not protected by the due process clause of the fourteenth amendment. 843 F.2d at 1152 (citing Paul v. Davis, 424 U.S. at 711-12, 96 S.Ct. at 1165-66). The Eighth Circuit Court of Appeals in American Family Life Assurance Company of Columbus v. Teasdale, 733 F.2d 559 (8th Cir. 1984) was faced with an allegation that a press release by Missouri Governor Joseph P. Teasdale, in which the Governor directed the Division of Insurance to ban the future sales of cancer policies in Missouri, deprived the American Family Life Assurance Company of a property interest without due process of law in violation of the fourteenth amendment. Id. at 559-565.

In its analysis of whether Governor Teasdale had in fact deprived American Family Life Assurance Company of a tangible property interest without due process of law, the Court of Appeals relied upon Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155 (1976) and concluded that American Family Life Assurance Company had failed "to adduce any credible evidence that Teasdale's press release deprived it of any tangible property interest without due process of law". 733 F.2d at 565. American Family Life had alleged that after the Governor's press release that their sales dropped and cancellations increased. Id. at 565. The Eighth Circuit Court of Appeals concluded that American Family had "completely failed to demonstrate that these losses were traceable to the objectionable press release". Id. at 565. The Court of Appeals further concluded, "Nor was American even able to show that the public generally understood the press release as a final determination that American was 'guilty' of wrongdoing and therefore 'prohibited' from selling cancer policies in the state". Id. at 565. The Court went on to state that "However, even if American were stigmatized by

the press release, this alone does not constitute such a property or liberty deprivation as to trigger federal due process protections". Id. at 565.

The Court relied upon the "change in legal status" test set forth in Paul v. Davis and stated "the offending state action -- in this case the press release -- must deprive the stigmatized party of a right to a benefit previously held under state law. 733 F.2d at 565.

The Court noted that a cease and desist order issued by the Director of the Insurance Division did deprive American of its right to sell cancer policies, however, that order was in accordance with the Missouri statutes and complied with due process requirements which is aside from the issues and allegations raised because of the Governor's press release. 733 F.2d at 565.

The U.S. Supreme Court in Securities and Exchange Commission v. O'Brien, 467 U.S. 733, 104 S.Ct. 2720 (1984) was faced with a situation in which the target of an S.E.C. investigation alleged that he was entitled to notice when the S.E.C. issued subpoenas to third parties. 467 U.S. at 735-40, 104 S.Ct. at 2722-23. The Supreme Court reviewed the broad authority granted to the S.E.C. by congress to conduct investigations and noted that the subpoenas issued by the S.E.C. are not self enforcing in that the S.E.C. is authorized to seek enforcement and compel compliance with the subpoenas in federal court. 467 U.S. 740, 104 S.Ct. 2724-25.

The Court noted that there was no obligation contained in the statutes governing the S.E.C.'s investigative power requiring the S.E.C. to notify the "target" of an investigation when a subpoena was issued to a third party. 467 U.S. at 741, 104 S.Ct. at 2725. The Court in O'Brien, relying upon Hannah v. Larche, 363 U.S. 420, 80 S.Ct. 1502 (1960), stated that the opinion of the Court in Hannah,

leaves no doubt that neither the due process clause of the fifth amendment nor the confrontation clause of the sixth amendment is offended when a federal administrative agency, without notifying a person under investigation, uses its subpoena power to gather evidence adverse to him. The due process clause is not implicated under such circumstances because an administrative investigation adjudicates no legal rights".

467 U.S. at 742, 104 S.Ct. at 2725.

The Court in O'Brien further stated "If the 'target' of an investigation by the S.E.C. has no fifth amendment right to challenge enforcement of a subpoena directed at a third party, he clearly can assert no derivative right to notice when the commission issues such a subpoena". 467 U.S. at 742-3, 104 S.Ct. at 2725.

In reviewing the investigative power of the S.E.C., the Court in O'Brien noted that the S.E.C. was empowered to conduct investigations which it deemed necessary to make a determination whether a person had violated or is about to violate any provisions of the chapter or any of the rules and regulations under the chapter. The Court in O'Brien further noted that the S.E.C. has the authority to "demand to see any papers 'the commission deems relevant or material to the inquiry'". 267 U.S. at 744, 104 S.Ct. at 2726.

The Court concluded in O'Brien that congress intended to "vest the S.E.C. with considerable discretion in determining when and how to investigate possible violations of the statutes administered by the commission". 467 U.S. at 745, 104 S.Ct. at 2726. The Court in O'Brien also stated "we discern no evidence that congress wished or expected that the commission would adopt any particular procedures for notifying 'targets' of investigations when it sought information from third parties". 467 U.S. at 745, 104 S.Ct. at 2726.

The Iowa Legislature has empowered the Citizens' Aide/Ombudsman's office broad authority in conducting investigations within the scope of 601G. Like the authority the United States Congress vested in the S.E.C., the Iowa Legislature intend to vest broad authority and power to investigate with the Citizens' Aide/Ombudsman's office.

The Court in O'Brien, noted that:

The imposition of a notice requirement on the S.E.C. would substantially increase the ability of persons who have something to hide to impede legitimate investigations by the commission. A target given notice of every subpoena issued to third parties would be able to discourage the recipients from complying, and then further delay disclosure of damage and information by seeking intervention in all enforcement actions brought by the commission. More seriously, the understanding of the progress of an S.E.C. inquiry that would flow from knowledge of which persons had received subpoenas would enable an unscrupulous target to destroy or alter documents, intimidate witnesses, or transfer securities or funds so that they could not be reached by the government.

467 U.S. at 750, 104 S.Ct. at 2729.

In Equal Employment Opportunity Commission (E.E.O.C.) v. Sears, Roebuck & Company, 504 F.Supp. 241 (N.D. Ill. 1980), the Federal District Court was faced with a situation in which Sears alleged that the E.E.O.C. leaked a copy of its decision to private interest groups and engaged in a media harassment campaign against Sears. 504 F.Supp. at 268.

Sears alleged that it had a "substantial property interest in its good name". Id. at 268. The Federal District Court, however, noted that the U.S. Supreme Court in Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155 (1976) rejected "the notion that every defamation by a governmental body triggers the protections of the due process clause. The Court in E.E.O.C. v. Sears quoted the Supreme Court in Paul v. Davis wherein the Supreme Court stated:

While we have in a number of our prior cases pointed out the frequently drastic effect of the "stigma" which may result from defamation by the government in a variety of context, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interest such as employment, is either "liberty" or "property" by itself sufficient to invoke the procedural protection of the due process clause.

504 F.Supp at 268.

The Federal District Court concluded that "any injury to reputation or good will resulting from the leak fails to reach constitutional proportions". 504 F.Supp. at 268. The Court in Sears stated "in order to establish a liberty or property interest sufficient to implicate fourteenth amendment safeguards, the individual must not only be stigmatized, but stigmatized in connection with the denial of a right or status previously recognized under state law". 504 F.Supp. at 269.

The Court concluded in Sears that "Sears has only shown some unfortunate publicity generated by a purely investigatory agency...it has not cited any 'plus' factor or tangible harm that directly resulted from the publicity". 504 F.Supp. at 269. Although the Court in E.E.O.C. v. Sears notes that Sears did allege some general loss of good will, the Court concluded that "This is highly speculative and certainly does not constitute the sort of 'tangible interest' averted to in Paul v. Davis. 504 F.Supp. at 269.

The Court in Sears analyzed the enforcement scheme in which the E.E.O.C. operated. The Court noted that the commission has the authority to investigate charges of discrimination and also to promote voluntary compliance with the

requirements of Title VII. In addition, the E.E.O.C. has authority to institute civil actions against employers or unions named in a discrimination charge. 504 F.Supp. at 254.

The Court noted that the E.E.O.C. commission's proceedings are "nonbinding and nonadjudicative". 504 F.Supp. at 254. The Court further noted that "the commission's responsibilities are 'only investigative'". 504 F.Supp. at 254. Additionally, the Court added that "no determinent consequences flow from E.E.O.C. investigation". 504 F.Supp. at 254.

The Citizens' Aide/Ombudsman's office, like the E.E.O.C., is not able to exercise any binding mandates over an subject of their investigations, nor does the Citizens' Aide/Ombudsman adjudicate the rights of any subject of their investigations. The entire process involved in the Citizens' Aide/Ombudsman office in performing their statutory duties is nonadjudicative. The Citizens' Aide/Ombudsman's office does not initiate criminal prosecutions, but investigates and reports to the Governor, Legislature or legislative committees. Iowa Code §601G. The Citizens' Aide/Ombudsman's office does not cause determinent consequences as a result of its investigation. To permit Sheriff Rolfes or anyone being investigated by the Citizens' Aide/Ombudsman's office the right to confront and cross-examine witnesses providing testimony or evidence to the Citizens' Aide/Ombudsman serves no purpose other than to thwart the legitimate goal of the Citizens' Aide/Ombudsman's office to gather facts. Such a finding by this court would have a chilling effect on the willingness of the citizens to bring forth their grievances against governmental agencies and officials to the Citizens' Aide/Ombudsman.

Sheriff Rolfes is asking this Court to find Chapter 601G unconstitutional as it permits the Citizens' Aide/Ombudsman's office to conduct an investigation without allowing the subject of the investigation to confront and cross-examine the individuals providing information to the Citizens' Aide/Ombudsman. The Iowa Supreme Court in Stanley v. Southwestern Community College Merged Area (Merged Area XIV), 184 N.W.2d 29 (Iowa 1971) held that "Regularly-enacted statutes are presumed to be constitutional, and courts exercise the power to declare such legislation unconstitutional with great caution. It is only when such conclusion is unavoidable that we do so." 184 N.W.2d at 32 citing Goreham v. Des Moines Met Area Solid Waste Agency, 179 N.W.2d 449, 455 (Iowa 1970).

In Stanley v. Southwestern Community College Merged Area, residents, voters and taxpayers of the Southwestern Community College Merged Area challenged the validity of an election for the issuance of bonds to construct and equip buildings for the Southwestern Community College. 184 N.W.2d at 32. In addition to the presumption that statutes are constitutional, the Iowa Courts have dealt with the matter of interpreting our statutes. In Hedges v. Iowa Department of Job Service, 368 N.W.2d 866 (Iowa Ct. App. 1985), the Iowa Court of Appeals stated, "In interpreting statutes, our ultimate goal is to ascertain and give effect to the intention of the legislature." 368 N.W.2d at 866 citing Kohrt v. Yetter, 344 N.W.2d 345, 246 (Iowa 1984). In Hedges, the Court further stated, "Therefore, unless the legislature otherwise defines them, we must ascribe to statutory terms their ordinary meaning." 368 N.W.2d at 866 citing State v. Jackson, 305 N.W.2d 420, 422 (Iowa 1981).

In Board of Supervisors of Linn County v. Department of Revenue, 263 N.W.2d 227 (Iowa 1978), the Iowa Supreme Court, when faced with the allegation that a newly amended statutory procedure for implementing inter county tax equalization violated due process clause held:

The legislature may devise any procedure desired provided it is not clearly repugnant to constitutional provision; wisdom or desirability of the design selected are of no concern to the courts.

263 N.W.2d at 235.

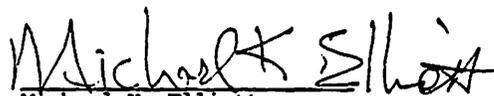
The Court further held that "statutes are presumed constitutional and the individual challenging the constitutionality of the statute must negate every reasonable basis on which the statute can be sustained". 263 N.W.2d at 235. The Iowa Supreme Court also stated that "Courts will not interfere when constitutionality is only doubtful or debatable". 263 N.W.2d at 235 citing Graham v. Worthington, 259 Iowa 845, 850-851, 146 N.W.2d 626, 630-631 (1966).

Clearly the constitutionality of Chapter 601G is to be presumed and Sheriff Rolfes "must negate every reasonable basis on which the statute can be sustained".

WHEREFORE, the Plaintiff, Citizens' Aide.Ombudsman, prays that this court order the Defendant, Sheriff Robert Rolfes, to comply with the subpoena served on him on June 9, 1988; deny the Defendant's motion for a protective order; find

that Iowa Code § 601G is constitutional and not violative of the due process clause of the fourteenth amendment and not violative of the Iowa Constitution; find that the nature of the proceeding before the Citizens' Aide/Ombudsman is "other agency action" and not a contested case proceeding requiring the application of Chapter 17A.10-.17 &.19; find that the function of the Citizens' Aide/Ombudsman is investigatory and not adjudicative in nature and, therefore, a person or agency being investigated by the Citizens' Aide/Ombudsman is not entitled to the disclosure of the identities of the person providing information to the agency and that the person or agency is not entitled to confront and cross-examine those individuals providing information to the Citizens' Aide/Ombudsman.

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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CITIZENS' AIDE/OMBUDSMAN, :
 Plaintiff, : EQUITY NO. CE 030-17391
 vs. :
 SHERIFF ROBERT ROLFES, :
 Defendant. : BRIEF IN SUPPORT
 MOTION FOR PROTECTIVE
 ORDER

FILED
 POLK COUNTY, IA
 JUN 20 PM 3:53
 CLERK DISTRICT COURT

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Sheriff Robert Rolfes' Motion for Protective Order was heard on December 20, 1988. Sheriff Rolfes and Ombudsman William P. Angrick, III, testified and numerous exhibits were received by the court. The facts pertinent to Sheriff Rolfes' motion follow.

FACTS

Sheriff Rolfes has been sheriff of Osceola County since January 1, 1972. His position is one which requires popular election every four years. In the 1984 general election, Sheriff Rolfes won by a 4 to 1 margin, in 1988 by a 2 to 1

margin. On June 7, 1988, Sheriff Rolfes won a contested primary election against Neil Rice.

On June 9, 1988, without any prior notice, three individuals from the Ombudsman's Office, Michael Ferjak, James Peterson, and Susan Voss, arrived in Sibley, Iowa, at the sheriff's office with a letter dated June 7. [Exhibit A.] This letter was given to Sheriff Rolfes along with numerous subpoenas commanding his appearance with voluminous information detailed in the subpoenas. [Exhibit B.] The letter purported to be notice of the Ombudsman's intent to investigate certain complaints as required by Iowa Code Section 601G.13. Although apparently not required by his own statute to specify the matters under inquiry, the Ombudsman also stated in that letter that the "complaints include among other things misuse of government property and violation of the Iowa gift law." [Exhibit A.] Both of these complaints involve alleged violations of the Iowa Criminal Code.

Sheriff Rolfes began to comply with the Ombudsman's subpoenas, but after consulting with local attorneys, he decided not to cooperate further until he was made aware of the specifics of the complaints against him. On June 9, the Ombudsman's team commenced interviewing people in the Osceola County Courthouse in such a fashion that the investigation quickly became a public matter. Indeed, by June 11, 1988, stories began to appear in local newspapers detailing the nature and subject of the Ombudsman's investigation.

On June 13, several individuals, all employees of Sheriff Rolfes, were granted "whistle blower" protection by the Ombudsman. [Exhibit D.] On June 15, 1988, the Ombudsman wrote another letter to Sheriff Rolfes with a substantially expanded list of areas of inquiry. [Exhibit E.] The new areas of inquiry included:

"use of county property and personnel, conduct relating to personal business ventures while holding the office of County Sheriff, receipt of money while holding office as County Sheriff, treatment of persons

incarcerated in the Osceola County Jail, meals served in the Osceola County Jail, use of monitoring and surveillance equipment, use of public property for personal use, processing of citations, training requirements for law enforcement officers." [Exhibit E.]

Again, many of these subjects involve potential criminal conduct. Sheriff Rolfes was scheduled to meet with the Ombudsman in Des Moines on June 22 to provide information. [Exhibit E.] In letters dated June 17 and June 21, Sheriff Rolfes' attorneys addressed the Ombudsman with complaints and objections to the practices and procedures employed by the Ombudsman's staff in conducting their investigative proceedings. [Exhibit C; Exhibit F.] The Ombudsman's staff was informed that Sheriff Rolfes would not comply with their subpoena until some procedural protections were afforded Sheriff Rolfes. [Exhibit F.]

In a letter dated June 30, 1988, the Ombudsman responded to Sheriff Rolfes' objections and argued that the Iowa Administrative Procedure Act, Iowa Code Chapter 17A, does not apply to them as they are a department of the general assembly, and further that their office was conducting itself pursuant to the broad authority granted it in Chapter 601G. [Exhibit G.]

Meanwhile, detailed news accounts continued to appear in the media. [Exhibit H.] On June 18, Neil Rice, Sheriff Rolfes' opponent in the primary election, apparently sparked by the public controversy created by the Ombudsman's investigation, declared his candidacy as an independent. The general election was to be held November 8. In a letter dated July 19, the Ombudsman's office informed Sheriff Rolfes' attorney of its intention to seek enforcement of its subpoena. [Exhibit I.] On August 3, 1988, the Ombudsman issued a subpoena by mail to Sheriff Rolfes and by hand delivery to his attorney, Raymond Rosenberg. [Exhibit J.] This subpoena commanded Sheriff Rolfes' appearance August 15 in Des Moines. This subpoena is the subject of the Petition to Compel Obedience.

In a letter dated August 10, attorney Raymond Rosenberg again informed the Ombudsman of the objections to the practices and procedures his office employed with respect to their investigation of Sheriff Rolfes. [Exhibit K.] Again, the Ombudsman was informed that Sheriff Rolfes would not comply with the Ombudsman's subpoena unless the safeguards of Chapter 17A contested case procedures or due process were provided. [Exhibit K.] The Ombudsman then filed on August 22, 1988, a Petition to Compel Obedience to a Subpoena. Defendant Robert Rolfes answered the petition on September 14, asserted affirmative defenses and simultaneously filed a motion for protective order combined with a memorandum in support, asserting essentially the same arguments that he has been asserting since June, 1988.

Sheriff Rolfes testified that he has already been damaged by the Ombudsman's activity in that his margin of victory in the November, 1988, election was one-half that of his 1984 election margin. He further testified that the Ombudsman's activities have disrupted the activities of the Osceola County Sheriff's Department and that Sheriff Rolfes has lost some of the public trust and confidence that is necessary for the performance of his duties. Additionally, Sheriff Rolfes testified that should a critical report be issued by the Ombudsman, his employability either as Sheriff or in some other capacity would be substantially damaged and impaired.

The Ombudsman's office was created in a 1973 Act of the General Assembly and has been granted broad powers under Iowa Code Chapter 601G to investigate agency activity either on complaint on its own initiative. After major investigations such as this, the Ombudsman either issues "Critical" or "Special" Reports. Most of the exercises of the Ombudsman's statutory authority under Chapter 601G are discretionary. The Ombudsman may, but is not required, to maintain secrecy in respect to matters under investigation, witnesses, complainants. Iowa Code

Section 601G.8. The Ombudsman may, but need not conduct private hearings. Iowa Code Section 601G.8. The Ombudsman may, but need not investigate any agency action and prescribe the methods by which complaints are to be acted upon. Iowa Code Section 601G.9. The Ombudsman may but need not decline to investigate a complaint if he finds substantiating facts supporting one of the enumerated grounds for declining. Iowa Code Section 601G.12. Finally, the Ombudsman may but need not publish and make available to the news media or others who may be concerned his conclusions and recommendations based upon his investigations. Iowa Code Section 601G.17. While exercising all this discretion, no member of the Ombudsman's staff or the Ombudsman himself may be compelled to testify with respect to any matter involving the exercise of their official duties. Iowa Code Section 601G.20.

The party being investigated does have the opportunity to respond to the Ombudsman's report prior to its issuance, however, he does not have the opportunity to take part in the proceedings which give rise to its issuance. The Ombudsman testified that it is his belief that his office can issue a critical report that concludes that criminal conduct occurred without a contested case hearing pursuant to Chapter 17A. The Ombudsman further testified that the accused in his proceedings has no right to confront witnesses, no right to cross examination and no right to offer evidence in his support. The Ombudsman's view is that the right to respond to the critical report is sufficient protection.

ARGUMENT

I. ADMINISTRATIVE ABUSES

Because the propriety of the actions of the Ombudsman and his staff are made immune from inquiry by the Ombudsman's enabling act, Sheriff Rolfes has been unable to obtain the evidence that would make out a clear-cut case of administrative abuse, but the record nevertheless gives some indications of such

abuses. All indications are that the complainant(s) were and are politically motivated and the complainants do not have standing to complain. The Ombudsman admitted that he was aware of this overtone to the complaint, but instead of refusing to investigate, he delayed until the primary was over. The Ombudsman should have exercised his discretion to not investigate. See: Iowa Code Section 601G.12(3)-(4). By pursuing the investigation during the sheriff election, the Ombudsman has injected himself into partisan political affairs on the side of Sheriff Rolfes' opponents. This is prohibited activity for the Ombudsman. Iowa Code Section 601G.7(4). Further, a number of subjects being investigated should be referred to other channels such as the county attorney or the attorney general. Iowa Code Section 601G.12(1). While the Ombudsman is not required to refuse to investigate matters which may constitute criminal conduct, the policy embodied in Iowa Code Sections 601G.12(1) and 601G.19 dictates that the Ombudsman should defer to the more appropriate agencies in this area. Indeed, once the Ombudsman believes that criminal proceedings are warranted, he must refer the matter to the appropriate authorities. Iowa Code Section 601G.19. For the Ombudsman to proceed to investigate the allegations of criminal conduct constitutes an abuse of the Ombudsman's administrative powers.

Additionally, the manner in which the Ombudsman has conducted his investigation lends further support to his office's abuses. The Ombudsman has made minimal efforts at best to keep the matters under inquiry private and non-public. Within a few days of the commencement of the investigation, news stories began to appear. The investigation was conducted in the county courthouse with witnesses apparently not instructed to maintain the secrecy of the proceedings. [Exhibit C.] While the Ombudsman is not required to maintain secrecy in its proceedings, again their failure to do so gives further indication of the

Ombudsman's disregard for the interests that Sheriff Rolfes has in this matter.

Finally, the use of subpoenas as search warrants is perhaps the most revealing evidence of the Ombudsman's abuse of authority. During their June investigation in Sibley, the Ombudsman's staff searched Sheriff Rolfes' office and the county-owned automobile designated for his use. Sheriff Rolfes resides at the county jail which is where the Sheriff's office is also located. This type of conduct is abusive administrative action.

II. APPLICABILITY OF THE IOWA ADMINISTRATIVE PROCEDURE ACT'S CONTESTED CASE PROVISIONS

The Ombudsman has maintained the position throughout the proceedings regarding Sheriff Rolfes that they are not an agency subject to Chapter 17A and further, that even if they are an agency subject to Chapter 17A, they are not required to comply with the contested case procedures contained therein. [Exhibit G;] Memorandum in Support of Response to Defendant's Motion. The Ombudsman's position constitutes the greatest irony of this case, for it is the Ombudsman's function to act as watchdog over the practices and procedures of other state agencies, but he himself claims not to be subject to those same procedural safeguards. The Ombudsman himself stated that his office's "role...in Iowa's governmental process is to insure that all citizens are treated equitably and fairly according to law and rule...The Ombudsman will speak out when a citizen is adversely affected by an agency's interpretation of a statute which has not been properly articulated in that agency's rules." [Exhibit U, page 1.]

In determining whether the Office of the Ombudsman is subject to contested case procedural guidelines under Chapter 17A three requirements must be satisfied. First, the office of the Citizen's Aide must be an "agency" as defined in Iowa Code

Section 17A.2(1). Second, the matters under inquiry with respect to Sheriff Rolfes must be a "contested case" as defined in Iowa Code Section 17A.2(2). Finally, the Citizens' Aide Act, Iowa Code Chapter 601G, must not expressly preclude the application of Chapter 17A to its operations. Iowa Code Section 17A.23.

A. The Office of the Ombudsman is an Agency as defined in Iowa Code Section 17A.2(1).

Iowa Code Section 17A.2(1) defines "agency" as: each board, commission, department, officer or other administrative office or unit of the state. "Agency" does not mean the general assembly, the judicial department or any of its components, the office of consumer advocate, the governor or a political subdivision of the state or its offices and units.

The Ombudsman's office falls within the plain language of the first sentence of this section defining it as an agency. Further, the Ombudsman is not excluded from the definition of agency by the second sentence. The office of the Ombudsman is not "the general assembly" and is not located in the judicial department. The Ombudsman is not the office of consumer advocate or the Governor. The office of the Ombudsman is not a political subdivision of the State.

Additionally, the Ombudsman has admittedly made agency rules pursuant to Chapter 17A. See: Iowa Administrative Code, Chapter 210. Only agencies, as defined in Code Section 17A.2(1) are required to make such rules. Iowa Code Section 17A.3. The Ombudsman, in making those rules, recognized in numerous places the applicability of Chapter 17A to its rule-making functions. Iowa Administrative Code, Chapter 210-3.1, 4.2, 4.4, 4.5.

Finally, the rules of construction found within Iowa Code Section 17A.23 establish that if sub-units of the general assembly were also intended to be exempted from the definition of agency, the legislature must have expressly provided for their exemption. Iowa Code Section 17A.23 provides in part:

"This Chapter shall also be construed to apply to all agencies not expressly exempted by this chapter or by another statute specifically referring to this chapter by name..." (Emphasis supplied). The Ombudsman's office is not expressly exempted in Chapter 17A nor is it expressly exempted in Chapter 601G. This position is consistent with the authoritative article written by one of the drafters of Chapter 17A. Bonfield, The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process, 60 Iowa L. Rev. 731, 765-66. (1975).

B. The Ombudsman's "Investigation" of Sheriff Rolfes is a Contested Case.

"Contested case" is defined in Iowa Code Section 17A.2(2) as:

a proceeding including but not restricted to ratemaking, price fixing, and licensing in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing.

There are several elements to the contested case definition.

1. "PROCEEDING"

The agency must be conducting a "proceeding" - that is it must be engaging in an "agency course of action - an agency procedure." Bonfield, The Definition of Formal Agency Adjudication Under the Iowa Administrative Procedure Act, 63 Iowa L.Rev. 285, 291 (1977). The Ombudsman has engaged in a course of action pursuant to his own administrative rules. The Ombudsman has commenced performing what he perceives to be his agency function: to investigate complaints, reach conclusions, and publish reports.

2. "DETERMINED"

Another element of the "contested case" definition is that the legal rights, duties, or privileges of a party are "determined". "Determined" means that "the issues in question come to an end or are authoritatively...settled or decided."

Bonfield, 63 Iowa L.Rev. at 291. Stated another way, the question is whether the Ombudsman is "formally deciding legal issues in an authoritative way...that definitively establishes the [Ombudsman's] position." Id. In all of the reports entered as Exhibits R-W, the Ombudsman is making determinations. In Report 86-1, the Ombudsman found and determined that the inmate "uprising appears to have been loosely organized by a small group of inmates who have prior assaultive criminal histories", and that there does not appear to be a specific basis for the uprising. [Exhibit R, pp. 5-6.] The Ombudsman determined that the use of force by the teacher against her pupil was inappropriate, that the school superintendent failed to adequately advise the board, and that the board failed in not being more inquisitive of the superintendent. [Exhibit T, pp. 24-5.] In Critical Report 84-3, the Ombudsman determined that "the Superintendent...has used his discretionary authority in an arbitrary and unreasonable manner." [Exhibit U, p. 7.] The Ombudsman need not have the capacity to do anything in regard to Sheriff Rolfes' employment in order to be making a "determination" for purposes of the contested case definition. The Ombudsman's reports constitute statements of his office's official position; it is their "determination" of the legal rights, duties and privileges of Sheriff Rolfes under specific circumstances.

3. "LEGAL RIGHTS, DUTIES OR PRIVILEGES"

Another element of the contested case definition is that the party must have "legal rights, duties or privileges" placed in controversy by the agency activity. Sheriff Rolfes' legal interest is his freedom to take advantage of what employment opportunities he so desires. That includes further employment as Osceola County Sheriff or in some other capacity. Sheriff Rolfes does have a "right to be free to move about and live and practice [his] profession without the burden of an unjustified

label of infamy." Anderson v. Low Rent Housing Commission, 304 N.W.2d 239, 224 (Iowa 1981). This "label of infamy" arise from accusations of "grave consequence" such as "dishonesty, immoral or illegal conduct that call into question [Sheriff Rolfes'] honesty, reputation or good name." Anderson, 304 N.W.2d at 244-5. The disclosed areas of inquiry involve potential criminal conduct and dishonesty on the part of Sheriff Rolfes. [Exhibit J.] Because of the nature of these charges, Sheriff Rolfes' procedural due process rights attach. Anderson, 304 N.W.2d at 243. See also: Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510 (1971); Board of Regents v. Roth, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707 (1972); Paul v. Davis, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160-1 (1976).

4. "REQUIRED"

The next element of the contested case definition is that the agency determination of rights, duties or privileges in question must be required to be determined only after an opportunity for an evidentiary hearing. The hearing may either be required by statute or constitutional due process. Iowa Code Section 17A.2(2). This matter does not involve ratemaking, price fixing or licensing. Chapter 601G does not require that an evidentiary hearing be held prior to the issuance of the Ombudsman's report, however, such hearings seem to be provided for if the Ombudsman sees fit. Iowa Code Sections 601G.8; 601G.9(2). Therefore, there is no statutory requirement that the Ombudsman provide an opportunity for an evidentiary hearing prior to reaching his conclusions and issuing his report. Therefore, Sheriff Rolfes' statutory right to contested case procedures turns on the mandates of the Constitution's Due Process Clause. The Constitution does require notice and opportunity to be heard prior to the Ombudsman's conclusions because the nature of the matters under inquiry gives rise to procedural due process rights. "The fundamental requisite of

due process of law is the opportunity to be heard." Goldberg v. Kelly, 397 U.S. 254, 267, 90 S.Ct. 1011, 1020 (1970). Stated another way, whenever a procedural due process right attaches notice and opportunity to be heard are required.

5. "EVIDENTIARY HEARING"

The next question is whether the hearing that is required is an evidentiary hearing. The Iowa Supreme Court has defined "evidentiary hearing" as "an oral proceeding whose purpose is to determine disputed facts of particular applicability known as adjudicative facts--the who, what, when, where, and why of particular individuals in specified circumstances." Polk County v. Iowa State Appeal Board, 330 N.W.2d 267, 277 (Iowa 1983). Clearly, the Ombudsman's investigation and report is going to determine adjudicative facts as the Ombudsman has done in past reports. [Exhibits R-W.] However, the Ombudsman is under the impression that he need not have any hearing prior to making such adjudicative findings. The Ombudsman is simply mistaken in Sheriff Rolfes' case as:

"procedural due process demands that whenever a state agency determines the legal rights, privileges, or duties of a specific party based upon that party's particular facts and circumstances, the state agency is bound to provide an opportunity for an evidentiary hearing. Stated differently, a state must usually provide an individual with an opportunity for a hearing of some sort when it takes action of particular applicability, defining a person's rights, on the basis of adjudicative facts."

Bonfield, The Definition of Formal Agency Adjudication Under the Iowa Administrative Procedure Act, 63 Iowa L.Rev. 285, 323 (1977). The Ombudsman's report will turn on questions of disputed facts. As the Supreme Court has stated:

"[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."

Goldberg v. Kelly, 397 U.S. 254, 269, 90 S.Ct. 1011, 1021 (1970). Additionally, "the decisionmaker's conclusion...must

rest solely on the legal rules and evidence adduced at the hearing." Goldberg, 397 U.S. at 271, 90 S.Ct. at 1022. He has a right to counsel's presence and assistance. Id. He should be allowed to present his own evidence. Goldberg, 397 U.S. at 268, 90 S.Ct. at 1020.

In summary, the Ombudsman's potential findings and conclusions have the ability to damage Sheriff Rolfes' future employability by stigmatizing him, and therefore, the Fourteenth Amendment's Due Process Rights to notice and opportunity to be heard attach. That Due Process Hearing Right is a right to an "evidentiary hearing" as defined in Polk County v. Iowa State Appeal Board, 330 N.W.2d at 277. What this means is that the matters under inquiry are matters of a "contested case" as defined in 17A.2(2) requiring that the Ombudsman comply with those procedures unless Chapter 601G specifically precludes Chapter 17A from application. Iowa Code Section 17A.23.

C. The Ombudsman's Act Does Not Expressly Provide that it Shall Take Precedence Over the Iowa Administrative Procedure Act as to the Contested Case Provisions.

Iowa Code Section 17A.23 states as follows:

Except as expressly provided otherwise by this chapter or by another statute referring to this chapter by name, the rights created and the requirements imposed by this chapter shall be in addition to those created or imposed by every other statute now in existence or hereafter enacted. If any other statute now in existence or hereafter enacted diminishes any right conferred upon a person by this agency by this chapter, this chapter shall take precedence unless the other statute expressly provides that it shall take precedence over all or some specified portion of this named chapter.

The Iowa administrative procedure act shall be construed broadly to effectuate its purposes. This chapter shall also be construed to apply to all agencies not expressly exempted by this chapter or by another statute specifically referring to this chapter by name; and except as to proceedings in process on July 1, 1975, this chapter shall be construed to apply to all covered agency proceedings and all agency action not expressly exempted by this chapter or by another statute specifically referring to this chapter by name. (Emphasis supplied).

Except for the express provision in Iowa Code Section 601G.9(1) relating to ex parte communications as described in Iowa Code Section 17A.17, there is no express provision relating to the inapplicability of Iowa Code Chapter 17A. This means that Chapter 17A procedures take precedence over Chapter 601G except as to Code Section 17A.17 relating to ex parte communications. This is true even where there appear to be irreconcilable differences between the requirements of Chapter 17A and the accepted practices under Chapter 601G.

III. Constitutional Due Process.

Even if this court should not hold that Chapter 17A is inapplicable to the Ombudsman's office, the Due Process Clause of the Constitution still requires some type of notice and a hearing very similar to the contested case hearing procedures described in Iowa Code Chapter 17A. This, again, is because the findings and conclusions which the Ombudsman proposes to make might injure Sheriff Rolfes' future employability. See: Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510 (1971); Board of Regents v. Roth, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707 (1972); Paul v. Davis, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160-1 (1976); Anderson v. Low Rent Housing Commission, 304 N.W.2d 239, 243 (Iowa 1981). Additionally, the process that is due is something near that of contested cases under Chapter 17A because of the fact-finding nature of the Ombudsman's conclusions. Goldberg v. Kelly, 397 U.S. 254, 269-272, 90 S.Ct. 1011, 1021-22 (1970).

It does not appear that a hearing of any sort is required by Chapter 601G. The only reference to a hearing is in Section 601G.8 wherein it says that "[t]he citizens' aide may conduct private hearings." Further, the Ombudsman may "[p]rescribe the methods by which complaints are to be made, received, and acted upon; determine the scope and manner of investigations to be made." Iowa Code Section 601G.9(2). Chapter 601G is presumed

to be valid, and this court might be inclined to reasonably construe these portions of Chapter 601G as allowing for a due process hearing, this court is not absolutely bound to find the act unconstitutional as applied in this case. State v. Duncan, 414 N.W.2d 91 (Iowa 1987); Hines v. Illinois Central Gulf R.R., 330 N.W.2d 284 (Iowa 1983). However, this court may not, under the guise of statutory construction, enlarge or otherwise change the terms of the statute. State v. Hatter, 414 N.W.2d 333 (Iowa 1987).

However, this could be said to constitute something of a special case where statutory construction could not reasonably save this statute while still holding it applicable to a situation affecting an individual's due process rights. The provision relating to the Ombudsman's discretion to hold "private hearings" in Section 601G.8 is not really a provision for a "hearing" within the due process sense. That portion of the Act, reasonably interpreted, only relates to the secrecy and privacy of the Ombudsman's investigative proceedings. Iowa Code Section 601G.8. There is no hearing procedure established in any portion of the Act, and the Ombudsman clearly is under the impression that his office is not required to hold any hearings of any sort. His administrative rules clearly establish that the Ombudsman does not believe his "hearing" powers are contested case hearings. Iowa Administrative Code Chapter 210 - 2.4(1)(a). The Ombudsman's interpretation of the hearing is that it is merely an internal operating device for information gathering. Iowa Administrative Code Chapter 210-2.4(1)(a). Everything indicates that the Ombudsman's authority was not designed to extend to matters of contested cases, or to matters which required a due process hearing. To construe this statute to extend the authority of the Ombudsman to matters of contested cases would be an unreasonable stretch of statutory construction. State v. Hatter, 414 N.W.2d 333, 337 (Iowa 1987).

If this court finds that this statute cannot reasonably be construed to convey jurisdiction to the Ombudsman over matters which require some sort of due process hearing, then the Ombudsman is acting outside the statutory authority granted to him in Chapter 601G. This would require the court to deny the Ombudsman's Petition to Compel Obedience as it was issued outside the Ombudsman's statutory authority. Iowa City Human Rights Commission v. Roadway Express, Inc., 397 N.W.2d 508, 510 (Iowa 1986).

CONCLUSION

The Defendant asks that this court deny the Ombudsman's Petition to Compel Obedience to the Subpoena for any of the reasons stated in this motion, or enter any other order as this court deems just and equitable under the circumstances, with the costs of defending this action assessed against the State.

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PROOF OF SERVICE
1-20-87
Cheri A. Middleton

JERRY L. ...
CLERK DISTRICT COURT
JAN 27 1988

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CITIZENS' AIDE/OMBUDSMAN,	:	
Plaintiff,	:	EQUITY NO. CE 030-17391
vs.	:	
SHERIFF ROBERT ROLFES,	:	FINDINGS OF FACT,
Defendant.	:	CONCLUSIONS OF LAW AND JUDGMENT

This cause of action came on for hearing before this court as an equity case wherein the Plaintiff, Citizens' Aide/Ombudsman, was represented by Michael K. Elliott and the Defendant, Sheriff Robert Rolfes, was represented by Raymond Rosenberg. The court having heard the testimony of the witnesses for the parties, examined the exhibits and reviewed the briefs presented to the court by counsel, hereby makes the following Findings of Fact herein.

FINDINGS OF FACT

1. The Defendant, Robert Rolfes, has been Sheriff of Osceola County since January 1, 1972.
2. On June 7, 1988, Sheriff Rolfes won a contested primary election against Neil Rice for the Republican nomination for Sheriff of Osceola County.
3. The Plaintiff, Citizens' Aide/Ombudsman is an agency of the State of Iowa created under Iowa Code Chapter 601G.
4. On June 9, 1988, without any prior notice, three individuals from the Ombudsman's Office, Michael Ferjak, James Peterson, and Susan Voss, arrived in Sibley, Iowa, at the Sheriff's Office with a letter dated June 7. This letter served as the Ombudsman's notice of intent to investigate certain complaints as required by Iowa Code Section 601G.13.
5. This letter was given to Sheriff Rolfes along with numerous subpoenas commanding the Sheriff's appearance with voluminous information which was detailed in the subpoenas.

6. The letter also indicated that the complaints being investigated by the Ombudsman included "among other things misuse of government property and violation of the Iowa gift law". These matters of inquiry involve potential criminal conduct under the Iowa Criminal Code.

7. Sheriff Rolfes, at first, cooperated with the Ombudsman's team of investigators, but after consulting with local attorneys, he decided not to cooperate further until he was made aware of the specifics of the complaint against him. Sheriff Rolfes scheduled a meeting with the Ombudsman for June 22 in Des Moines.

8. On June 9, the Ombudsman's team commenced interviewing people in the Osceola County Courthouse in such a fashion that the investigation quickly became a public matter. By June 11, stories began to appear in local newspapers detailing the nature and subject of the Ombudsman's investigation.

9. On June 13, several individuals, all employees of Sheriff Rolfes, were granted "whistle blower" protection by the Ombudsman.

10. On June 15, the Ombudsman wrote another letter to Sheriff Rolfes with a substantially expanded list of areas of inquiry, including:

"use of county property and personnel, conduct relating to personal business ventures while holding the office of County Sheriff, receipt of money while holding office as County Sheriff, treatment of persons incarcerated in the Osceola County Jail, meals served in the Osceola County Jail, use of monitoring and surveillance equipment, use of public property for personal use, processing of citations, training requirements for law enforcement officers."

Again, many of these matters concern potential criminal conduct.

11. In letters dated June 17 and June 21, Sheriff Rolfes' addressed the Ombudsman with complaints and objections to the practices and procedures employed by the Ombudsman's Office in conducting their investigative proceedings. In these letters, the Ombudsman's staff was informed that Sheriff Rolfes did not

intend to comply with their subpoena until some procedural protections were afforded.

12. In a letter dated June 30, 1988, the Ombudsman responded to Sheriff Rolfes' objections and argued that the Iowa Administrative Procedure Act, Iowa Code Chapter 17A, does not apply to them as they are a department of the general assembly, and further that their office was conducting itself pursuant to the broad authority granted it in Chapter 601G.

13. Throughout this time, detailed news accounts continued to appear in the media.

14. On June 18, Neil Rice, Sheriff Rolfes' opponent in the primary election, in the midst of the public controversy created by the Ombudsman's investigation, declared his candidacy as an independent. The general election was to be held November 8.

15. In a letter dated July 19, the Ombudsman's office informed Sheriff Rolfes' attorney of its intention to seek enforcement of its subpoena delivered by mail to Sheriff Rolfes and by hand delivery to his attorney, Raymond Rosenberg. This subpoena commanded Sheriff Rolfes' appearance August 15 in Des Moines. This subpoena is the subject of the Petition to Compel Obedience.

16. In a letter dated August 10, attorney Raymond Rosenberg again informed the Ombudsman of the objections to the practices and procedures his office employed with respect to their investigation of Sheriff Rolfes. Again, the Ombudsman was informed that Sheriff Rolfes would not comply with the Ombudsman's subpoena unless the safeguards of Chapter 17A contested case procedures or due process were provided.

17. On August 22, 1988, the Ombudsman filed a Petition to Compel Obedience to a Subpoena. Defendant Robert Rolfes answered the petition on September 14, asserted affirmative defenses and simultaneously filed a motion for protective order combined with

a memorandum in support, asserting essentially the same arguments that he has been asserting since June, 1988.

18. Sheriff Rolfes may have already been damaged by the Ombudsman's activity in that his margin of victory in the November, 1988, election was one-half that of his 1984 election margin. In 1988, he won by a 2 to 1 margin, while in 1984, the margin was 4 to 1.

19. The Ombudsman's activities have disrupted the operations of the Osceola County Sheriff's Department.

20. Sheriff Rolfes has lost some of the public trust and confidence that is necessary for the performance of his duties. Sheriff Rolfes' honesty, good name, reputation, and ethics have been questioned and damaged.

21. Should a critical report be issued by the Ombudsman, involving matters suggestive of criminal activity, Sheriff Rolfes' employability either as Sheriff or in some other capacity would be substantially damaged and impaired. It is apparent from the record that a critical report is imminent.

22. The Ombudsman's office was created in a 1973 Act of the General Assembly and has been granted broad powers under Iowa Code Chapter 601G to investigate agency activity either on complaint or its own initiative. After major investigations such as this, the Ombudsman either issues "Critical" or "Special" Reports that determine disputed facts relevant to specific situations.

23. Most of the exercises of the Ombudsman's statutory authority under Chapter 601G are discretionary. The Ombudsman may, but is not required, to maintain secrecy in respect to matters under investigation, witnesses, complainants. Iowa Code Section 601G.8. The Ombudsman may, but need not, conduct private hearings. Iowa Code Section 601G.8. The Ombudsman may, but need not, investigate any agency action and prescribe the methods by which complaints are to be acted upon. Iowa Code Section 601G.9.

The Ombudsman may, but need not, decline to investigate a complaint if he finds substantiating facts supporting one of the enumerated grounds for declining. Iowa Code Section 601G.12. Finally, the Ombudsman may, but need not, publish and make available to the news media or others who may be concerned his conclusions and recommendations based upon his investigations. Iowa Code Section 601G.17.

24. While exercising all this discretion, no member of the Ombudsman's staff or the Ombudsman himself may be compelled to testify with respect to any matter involving the exercise of their official duties. Iowa Code Section 601G.20. However, in this proceeding, the Ombudsman did choose to testify on his own free will.

25. The party being investigated does have the opportunity to respond to the Ombudsman's report containing determination of disputed facts and conclusions based thereon prior to its issuance, however, he does not have the opportunity to take part in the proceedings which give rise to its issuance. Sheriff Rolfe has been denied the opportunity to present evidence, subpoena witnesses or engage in cross-examination of witnesses.

26. The Ombudsman testified that it is his belief that his office can issue a critical report that concludes that criminal conduct has occurred without a contested case hearing pursuant to Chapter 17A. The Ombudsman further testified that the accused in his proceedings has no right to confront witnesses, no right to cross examination and no right to offer evidence in his support. The Ombudsman's view is that the right to respond to the critical report is sufficient protection.

CONCLUSIONS OF LAW

1. Chapter 601G provides the Ombudsman with wide, but not absolute discretion in the matters referred to in finding of fact 23. Discretionary administrative action should not be

supported by courts when it is apparent from the record that there has been an abuse of the agency's wide discretion or when the agency action is unreasonable. Iowa-Illinois Gas and Electric v. Iowa State Commerce Commission, 412 N.W.2d 600, 604 (Iowa 1987); Frank v. Iowa Department of Transportation, 386 N.W.2d 86, 87 (Iowa 1986). There is substantial evidence in the record that the Ombudsman's office is abusing his discretion and acting unreasonably in investigating the criminal matters complained of. The Citizens' Aide/Ombudsman agency is not a grand jury nor was it created to duplicate the functions of a grand jury. All of the Ombudsman's discretionary authority dictates against pursuing the matters here complained of. Iowa Code Section 601G.12(1) indicates that the Ombudsman should defer to the more appropriate investigatory bodies with respect to the matters concerning potential criminal conduct. While he is not prohibited from pursuing these matters, the sound exercise of his discretion militates against it. Iowa Code Section 601G.12.

2. The Ombudsman's Office is an agency as defined in Iowa Code Section 17A.2(1).

Iowa Code Section 17A.2(1) defines "agency" as:

each board, commission, department, officer or other administrative office or unit of the state. "Agency" does not mean the general assembly, the judicial department or any of its components, the office of consumer advocate, the governor or a political subdivision of the state or its offices and units.

The Ombudsman's office falls within the plain language of the first sentence of this section defining it as an agency. Further, the Ombudsman is not excluded from the definition of agency by the second sentence.

Additionally, the Ombudsman has admittedly made agency rules pursuant to Chapter 17A. See: Iowa Administrative Code, Chapter 210. Only agencies, as defined in Code Section 17A.2(1) are required to make such rules. Iowa Code Section 17A.3. The Ombudsman, in making those rules, recognized in numerous places

the applicability of Chapter 17A to its rule-making functions. Iowa Administrative Code, Chapter 210-3.1, 4.2, 4.4, 4.5.

Finally, the rules of construction found within Iowa Code Section 17A.23 establish that if sub-units of the general assembly were also intended to be exempted from the definition of agency, the legislature must have expressly provided for their exemption. Iowa Code Section 17A.23 provides in part: "This Chapter shall also be construed to apply to all agencies not expressly exempted by this chapter or by another statute specifically referring to this chapter by name..." (Emphasis supplied). The Ombudsman's office is not expressly exempted in Chapter 17A nor is it expressly exempted in Chapter 601G. This position is consistent with the authoritative article written by one of the drafters of Chapter 17A. Bonfield, The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process, 60 Iowa L. Rev. 731, 765-66. (1975). Under the overwhelming weight of authorities, the Ombudsman's office is an "agency" within the definition of Iowa Code Section 17A.2(1).

3. The Ombudsman's investigation of Sheriff Rolfes constitutes a "contested case" as defined in Iowa Code Section 17A.2(2). "Contested case" is defined in Iowa Code Section 17A.2(2) as:

a proceeding including but not restricted to ratemaking, price fixing, and licensing in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing.

There are several elements to the contested case definition, but generally:

"procedural due process demands that whenever a state agency determines the legal rights, privileges, or duties of a specific party based upon the party's particular facts and circumstances, the state agency is bound to provide an opportunity for an evidentiary hearing. Stated differently, a state must usually provide an individual with an opportunity for a hearing of some sort when it takes action of particular

applicability, defining a person's rights, on the basis of adjudicative facts."

Bonfield, The Definition of Formal Agency Adjudication Under the Iowa Administrative Procedure Act, 63 Iowa L.Rev. 285, 323 (1977).

a. The Ombudsman is conducting a "proceeding" as that term is used in Iowa Code Section 17A.2(2). A proceeding is an "agency course of action - an agency procedure."

Bonfield, The Definition of Formal Agency Adjudication Under the Iowa Administrative Procedure Act, 63 Iowa L.Rev. 285, 291 (1977). The Ombudsman has been engaged in a course of action pursuant to his own administrative rules. The Ombudsman has commenced performing what he perceives to be his agency function: to investigate complaints, reach conclusions, and publish reports. This definition is also consistent with the rules of construction in Iowa Code Section 17A.23 and the statement of purposes in Section 17A.1(2).

b. Another element of the "contested case" definition is that the legal rights, duties, or privileges of a party are "determined". "Determined" means that "the issues in question come to an end or are authoritatively...settled or decided." Bonfield, 63 Iowa L.Rev. at 291. Stated another way, the question is whether the Ombudsman is "formally deciding legal issues in an authoritative way...that definitively establishes the [Ombudsman's] position." Id. In the reports entered as Exhibits, the Ombudsman is making determinations. In Report 86-1, the Ombudsman found and determined that the inmate "uprising appears to have been loosely organized by a small group of inmates who have prior assaultive criminal histories", and that there does not appear to be a specific basis for the uprising. [Exhibit R, pp. 5-6.] The Ombudsman determined that the use of force by the teacher against her pupil was inappropriate, that the school superintendent failed to adequately advise the board, and that the board failed in not

being more inquisitive of the superintendent. [Exhibit T, pp. 24-5.] In Critical Report 84-3, the Ombudsman determined that "the Superintendent...has used his discretionary authority in an arbitrary and unreasonable manner." [Exhibit U, p. 7]. The Ombudsman need not have the capacity to do anything in regard to Sheriff Rolfes' employment in order to be making a "determination" for purposes of the contested case definition. The Ombudsman's reports constitute statements of his office's official position; it is their "determination" of the legal rights, duties and privileges of Sheriff Rolfes under specific circumstances. Construing Chapter 17A to effectuate its purposes (Iowa Code Section 17A.23), the Ombudsman is making determinations for purposes of the contested case definition.

c. Another element of the "contested case" definition is that the party must have "legal rights, duties or privileges" placed in controversy or affected by the agency activity. Sheriff Rolfes' legal interest in his freedom to take advantage of what employment opportunities he so desires. That includes further employment as Osceola County Sheriff or in some other capacity. Sheriff Rolfes does have a "right to be free to move about and live and practice [his] profession without the burden of an unjustified label of infamy." Anderson v. Low Rent Housing Commission, 304 N.W.2d 239, 224 (Iowa 1981). This "label of infamy" arises from accusations of "grave consequence" such as "dishonesty, immoral or illegal conduct that call into question [Sheriff Rolfes] honesty, reputation or good name." Anderson, 304 N.W.2d at 244-5. The disclosed areas of inquiry involve potential criminal conduct and dishonesty on the part of Sheriff Rolfes. [Exhibit J.] Because of the nature of these charges, Sheriff Rolfes' procedural due process rights attach. Anderson, 304 N.W.2d at 243. See also: Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510 (1971); Board of Regents v. Roth, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707

(1972); Paul v. Davis, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160-1 (1976). It is true that Sheriff Rolfes has no "right" to be employed as Osceola County Sheriff, but he does have a right to due process in certain situations relating to that employment.

The Iowa Supreme Court in Anderson v. Low Rent Housing Commission, 304 N.W.2d 239, 243 (Iowa 1981) held as follows with respect to the protections afforded by the Fourteenth Amendment's Due Process Clause to an employee of the State:

As applied to public employment, due process does not afford a right to public employment, but it does afford certain constitutional rights in relation to such employment. See McDowell v. Texas, 465 F.2d 1342, 1345-46 (5th Cir. 1971), cert. denied, 410 U.S. 943, 93 S.Ct. 1371, 35 L.Ed.2d 610 (1973). Among these rights is the right to procedural due process when charges are brought against an employee which might seriously damage standing and association in the community or impose a stigma or other disability that forecloses the freedom of the employee to take advantage of other employment opportunities.

d. The next element of the contested case definition is that the agency determination of rights, duties or privileges in question must be required to be determined only after an opportunity for an evidentiary hearing. "Required" as used here simply means "bound as a matter of law". Bonfield, 63 Iowa L.Rev. at 300. The hearing may either be required by statute or constitutional due process. Iowa Code Section 17A.2(2). This matter does not involve ratemaking, price fixing or licensing. Chapter 601G does not required that an evidentiary hearing be held prior to the issuance of the Ombudsman's report, however, such hearings seem to be provided for if the Ombudsman sees fit. Iowa Code Sections 601G.8; 601G.9(2). Therefore, there is no statutory requirement that the Ombudsman provide an opportunity for an evidentiary hearing prior to reaching his conclusions and issuing his report. Therefore, Sheriff Rolfes' right to contested case procedures turns on the mandates of the Constitution's Due Process Clause.

The Constitution does require notice and opportunity to be held prior to the Ombudsman's conclusions because the nature of

the matters under inquiry gives rise to procedural due process rights. "The fundamental requisite of due process of law is the opportunity to be heard." Goldberg v. Kelly, 397 U.S. 254, 267, 90 S.Ct. 1011, 1020 (1970). Stated another way, whenever a procedural due process right attaches notice and opportunity to be heard are required. This right to procedural due process attached at the point when the charges were made by the Ombudsman against Sheriff Rolfes. Anderson, 304 N.W.2d at 243.

e. The final question for the contested case definition is whether the hearing that is required is an "evidentiary hearing". The Iowa Supreme Court has defined "evidentiary hearing" as "an oral proceeding whose purpose is to determine disputed facts of particular applicability known as adjudicative facts--the who, what, when, where, and why of particular individuals in specified circumstances." Polk County v. Iowa State Appeal Board, 330 N.W.2d 267, 277 (Iowa 1983). Clearly, the Ombudsman's investigation and report is going to determine adjudicative facts as the Ombudsman has done in past reports. [Exhibits R-W]. He admitted this at the hearing. However, the Ombudsman is under the impression that he need not have any hearing, let alone an evidentiary hearing, prior to making such adjudicative findings. The Ombudsman is simply mistaken in Sheriff Rolfes' case as:

procedural due process demands that whenever a state agency determines the legal rights, privileges, or duties of a specific party based upon that party's particular facts and circumstances, the state agency is bound to provide an opportunity for an evidentiary hearing.

Bonfield, The Definition of Formal Agency Adjudication Under the Iowa Administrative Procedure Act, 63 Iowa L.Rev. 285, 323 (1977). The Ombudsman's report will turn on questions of disputed facts. As the U.S. Supreme Court has stated:

"[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."

Goldberg v. Kelly, 397 U.S. 254, 269, 90 S.Ct. 1011, 1021 (1970). Additionally, the "decisionmaker's conclusion...must rest solely on the legal rules and evidence adduced at the hearing." Goldberg, 397 U.S. at 271, 90 S.Ct. at 1022. He has a right to counsel's presence and assistance. Id. He should be allowed to present his own evidence. Goldberg, 397 U.S. at 268, 90 S.Ct. at 1020. All of these safeguards are provided for in the contested case provisions of Chapter 17A.

4. Chapter 401G does not expressly provide that it shall take precedence over Chapter 17A as to the contested case provisions, therefore the Ombudsman is bound by Chapter 17A in all of his "investigations" which fall within the "contested case" definition.

Iowa Code Section 17A.23 states as follows:

Except as expressly provided otherwise by this chapter or by another statute referring to this chapter by name, the rights created and the requirements imposed by this chapter shall be in addition to those created or imposed by every other statute now in existence or hereafter enacted. If any other statute now in existence or hereafter enacted diminishes any right conferred upon a person by this agency by this chapter, this chapter shall take precedence unless the other statute expressly provides that it shall take precedence over all or some specified portion of this named chapter.

The Iowa administrative procedure act shall be construed broadly to effectuate its purposes. This chapter shall also be construed to apply to all agencies not expressly exempted by this chapter or by another statute specifically referring to this chapter by name; and except as to proceedings in process on July 1, 1975, this chapter shall be construed to apply to all covered agency proceedings and all agency action not expressly exempted by this chapter or by another statute specifically referring to this chapter by name. (Emphasis supplied).

5. Because Chapter 17A applies and the Ombudsman is not complying and does not intend to comply with the contested case provisions of Chapter 17A, Sheriff Rolfes' protective order should be granted and the Ombudsman's Petition to Compel Obedience denied for no individual should be compelled to partake in an unlawful proceeding. Constitutional due process mandates that the Ombudsman provide some sort of hearing prior to

his determination, even if he is not required to comply with the contested case provisions of Chapter 17A.

6. Even if the Ombudsman is correct and the contested case provisions of Chapter 17A are inapplicable to this particular action involving Sheriff Rolfes, this court finds that Sheriff Rolfes is nevertheless entitled to Constitutional Due Process via the Fourteenth Amendment to the United States Constitution. His due process rights attached at the point when the stigmatizing charges were made against him. Anderson v. Low Rent Housing Commission, 304 N.W.2d 239, 243 (Iowa 1981). This, again, is because the charges involve allegations of dishonesty and criminal conduct which have the potential to injure and have already injured Sheriff Rolfes' current and future employability. Anderson, 304 N.W.2d at 243; Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510 (1971); Board of Regents v. Roth, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707 (1972); Paul v. Davis, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160-61 (1976). Additionally, the process that is due is something near that of contested cases under Chapter 17A because of the particularized fact-finding nature of the Ombudsman's reports. Goldberg v. Kelly, 397 U.S. 254, 269-72, 90 S.Ct. 1011, 1021-22 (1970).

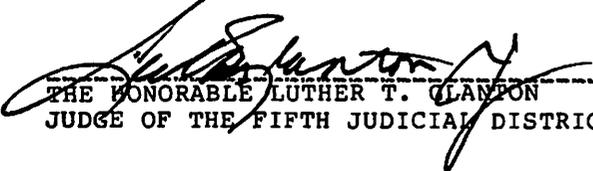
7. Chapter 601G does not expressly provide for a due process hearing, although it is suggested that this court might be able to "read" such a hearing into the act. Section 601G.8 provides that "[t]he citizens' aide may conduct private hearings." Iowa Code Section 601G.9(2) indicates that the Ombudsman may "[p]rescribe the methods by which complaints are to be made, received, and acted upon; determine the scope and manner of investigations to be made." This court is presented with essentially three options in this regard: 1. To find that these above sections provide Sheriff Rolfes with an opportunity to a due process hearing prior to the issuance of the Ombudsman Report; 2. To find that the Ombudsman Act does not provide for

a hearing of any sort and therefore that the act is unconstitutional as applied in this case; or 3. To find that the Ombudsman is acting beyond his statutory authority in the investigation of the complaints against Sheriff Rolfes. This court finds that regardless of which of the three "options" it takes, the Petition to Compel Obedience to the Subpoena should be denied and the Motion for Protective Order granted as the Ombudsman is either not providing a due process hearing as provided for in the act, is engaging in an unconstitutional process, or lacks statutory authority to compel Sheriff Rolfes to appear and answer questions on the subject matter of the complaint.

JUDGMENT

In light of the above findings of fact and conclusions of law, the court finds that Defendant's Motion for Protective Order should be granted and the Ombudsman's Petition to Compel Obedience denied.

Dated 4/26/89



THE HONORABLE LUTHER T. CLANTON
JUDGE OF THE FIFTH JUDICIAL DISTRICT OF IOWA

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

ROBERT ROLFES,
An individual,

CIVIL NO. C89-4049

Plaintiff

vs.

WILLIAM P. ANGRICK II,
MICHAEL J. FERJAK,
SUSAN E. VOSS;
JAMES PETERSON;
THE CITIZENS' AIDE/OMBUDSMAN,
an Agency of the State of Iowa;
and STATE OF IOWA;

FIRST AMENDED COMPLAINT
JURY TRIAL DEMANDED

Defendants

JURISDICTION AND VENUE

1. This action is brought pursuant to 42 U.S.C. Sections 1983 and 1988, and the Fourth, Fifth and Fourteenth amendments to the Constitution of the United States.

2. Jurisdiction is founded on 29 U.S.C. Sections 1331, 1343 (1)-(4) and the aforementioned statutory and constitutional provisions.

3. The amount in controversy exclusive of interest and costs exceeds jurisdictional limitations imposed by law, if any.

4. The complaint arose within the Northern District of Iowa. Venue is founded on 28 U.S.C. Section 1391(b).

PARTIES

5. Plaintiff, Robert Rolfes, is a citizen of the United States and a resident of the State of Iowa. He resides within the Northern District of Iowa at Sibley, Iowa. He sues in his individual capacity and not in the public capacity which he holds as Sheriff of Osceola County, Iowa.

6. Defendant, William P. Angrick II, is an individual. He is sued in his individual capacity and his professional capacity as a state employee.

7. Defendant, Michael J. Ferjak, is an individual. He is sued in his individual capacity and his professional capacity as a state employee.

8. Defendant, Susan E. Voss, is an individual. She is sued in her individual capacity and her professional capacity as a state employee.

9. Defendant, James Peterson, is an individual. He is sued in his individual capacity and his professional capacity as a state employee.

10. Defendant, the State of Iowa, is a sovereign State within the United States of America, and at all times pertinent to this complaint employed William P. Angrick II, Michael J. Ferjak, Susan E. Voss, and James Peterson.

11. At all times pertinent to this complaint, and in all of their actions described in this complaint, defendants

were acting under color of state law, and in the scope of employment for the State of Iowa.

12. At all times pertinent to this complaint, defendants, the State of Iowa and William P. Angrick II, had an unconstitutional policy and custom of encouraging and carrying out "investigations" of persons holding public office without affording those persons basic procedural protections required by statute and constitution, and thereafter making public, written findings which stigmatized and damaged those persons with respect to their employment. Further, these defendants implicitly and explicitly authorized each of the illegal actions described in this complaint.

13. At all times pertinent to this complaint, each of the individually named defendants acted in concert and conspired with the other defendants to violate plaintiff's civil rights and cause him other damage as set forth below.

FIRST CLAIM FOR RELIEF
CIVIL RIGHTS VIOLATION

14. Prior to June 7, 1988, defendants conspired and decided individually and in concert, to initiate and conduct an "investigation" directed at the plaintiff's personal business affairs and alleged related illegal acts while holding the office of Osceola County Sheriff.

15. The defendants' "investigation" had as its purpose from its inception, the production of a public report called

a "Critical Report," containing findings of fact and legal conclusions which would stigmatize the plaintiff and would be released to the public.

16. At the direction of defendant Angrick, the defendants, Michael J. Ferjak, Susan E. Voss, and James Peterson, without prior notice to the plaintiff, went to the plaintiff's office at the Osceola County Sheriff's Department in Sibley, Iowa, on June 9, 1989, and served upon him numerous subpoenas commanding his nearly immediate appearance with voluminous information which was detailed in the subpoenas. At the same time, defendants served upon plaintiff a subpoena commanding him to appear to be witness against himself as to matters known to defendants to be potentially criminal in nature, if proven.

17. Defendants' methods were purposely calculated to cause plaintiff to give a statement and thereby circumvent his right against self-incrimination under the Fifth and Fourteenth Amendments.

18. On that same date, and at the direction of the defendant Angrick, the defendants, Michael J. Ferjak, Susan E. Voss, and James Peterson, commenced interviewing people in a public place, the Osceola County Courthouse, in a manner which was biased and hostile against the plaintiff; which clearly suggested to those interviewed, that the plaintiff was guilty of wrongdoing in his capacity as

Sheriff; and which clearly showed to those interviewed, the focus of the investigation.

19. Defendants made no attempt to keep the focus of their "investigation" confidential and, in fact, conducted their "investigation" in a public manner which was calculated to attract media attention. Further, defendants did not instruct interviewees to keep the matters under inquiry confidential and, to the contrary, solicited and encouraged local persons to engage in public criticism of the plaintiff and to accuse him of criminal misconduct.

20. Defendants directly and indirectly leaked information to the public and to the news media and allowed the "investigation" to attract public attention. As a consequence, by June 11, stories began appearing in local newspapers detailing the nature and subject of the "investigation" and stigmatizing plaintiff.

21. On June 10, 1988, defendants also, without permission and without a search warrant, searched plaintiff's private vehicle and private office to seek evidence relating to their "investigation."

22. In the face of this "investigation," plaintiff requested in writing from defendants, that minimal procedural due process be afforded to him prior to issuance of any report based on the "investigation." Plaintiff also protested in writing, defendants' illegal search.

23. Nonetheless, defendants refused to afford plaintiff any procedural due process in connection with the "investigation." Specifically, defendants refused to provide the following, and thereby violated plaintiff's constitutional rights as follows:

23.1 Notice in writing of the charges against the defendant.

23.2 The opportunity to present evidence.

23.3 The identity of his accusers.

23.4 The opportunity to cross-examine his accusers.

23.5 A full, fair, and impartial hearing.

24. Defendants during the months of July, 1988, through January, 1989, continued to conduct their illegal "investigation," continued to leak information about the "investigation" to the media both directly and through local persons who were on their side of the "investigation," and continued to deny plaintiff his right to fundamental constitutional protections in their "investigation".

25. Further, at all times pertinent to this complaint, plaintiff was involved in a contested election for the office of Sheriff, and this was known to the defendants.

26. Defendants' proceeding with their investigation and ultimate plan to issue a report, injured the plaintiff's reputation and good name, and his current and future employability as a public official, and, had defendants'

investigation concluded as planned, was also likely to cost him the election in 1988.

27. During this same period, defendants attempted to subpoena plaintiff to testify against himself, and, when plaintiff refused to obey the subpoena, initiated court action against him in the Iowa District Court for Polk County to compel him to testify against himself in violation of the Fifth and Fourteenth Amendments to the Constitution.

28. When plaintiff resisted defendants' court action, defendants, in retaliation for plaintiff's exercise of his constitutional rights, publicly suggested that the plaintiff was trying to obstruct the "investigation" and hide wrongful conduct.

29. As a consequence of the defendants' court action, public court hearings were held, which attracted additional media attention and further stigmatized the plaintiff.

30. In June and July, 1989, the defendants contacted the Iowa Attorney General's office and attempted to procure a prosecution of the plaintiff for the purpose of punishing plaintiff for asserting his constitutional rights.

31. In the fall of 1988, defendants also initiated repeated audits of the Osceola County Sheriff's Department through their agent, the State of Iowa Auditor, for the purpose of punishing plaintiff for the exercise of his constitutional rights and to deter him from further exercise of those rights.

32. As a result of the defendants' attempt to procure a prosecution of the plaintiff, the Iowa Attorney General's office assembled a grand jury in Osceola County, Iowa in January, 1989.

33. The grand jury interviewed numerous witnesses and reviewed supposed evidence assembled by the defendants over the course of six months. However, despite defendants' spending many hours of public time and effort in attempting to procure evidence against plaintiff pursuant to their vindictive "investigation", the grand jury found no probable cause to believe that plaintiff had committed a crime, and declined to indict the plaintiff.

34. The grand jury proceedings were also the subject of media attention, public speculation, and comment, and caused plaintiff loss of reputation, emotional harm, legal expense and other damage.

35. Following the grand jury proceedings, and in retaliation for plaintiffs' exercise of his constitutional rights, defendants and their agent, the State of Iowa Auditor, caused publication and release to the media of a report which falsely accused plaintiff of failing to maintain a required record (jail log book); which falsely stated that because he did not keep the jail log book, he had no records to verify the number of meals served to prisoners; and which falsely implied that plaintiff's wife

and plaintiff stole money from Osceola County by overbilling for prisoner meals served by plaintiff's wife.

36. As a result of the defendants' illegal actions and violations of plaintiff's civil liberties, as described in this complaint, plaintiff has suffered damages as follows:

36.1 Deprivation of plaintiff's civil rights.

36.2 Loss of the public trust and confidence necessary for the performance of plaintiff's duties as Osceola County Sheriff.

36.3 Damage to plaintiff's reputation and good name.

36.4 Impairment of future earning capacity.

36.5 Emotional distress.

36.6 Interference in plaintiff's relationships with members of his immediate family.

36.7 Legal expenses and attorney fees.

37. Plaintiff is entitled to reasonable attorney fees for the services of his attorneys in this action, in accordance with federal law.

THEREFORE, plaintiff respectfully requests judgment against the defendants, William P. Angrick II, Michael J. Ferjak, Susan E. Voss, James Peterson, the Citizen's Aide/Ombudsman, and the State of Iowa, in an amount sufficient to fairly and reasonably compensate him for his damages, plus interest as provided by law, plus reasonable attorney fees as provided in the United States Code.

SECOND CLAIM FOR RELIEF
WILLFUL AND WANTON ACTS

In the alternative to and supplementary to his first claim, plaintiff pleads as follows:

38. Plaintiff re-pleads and re-alleges paragraphs 1 through 37 of this complaint.

39. The actions of the individual defendants, William P. Angrick II, Michael J. Ferjak, Susan E. Voss, and James Peterson, which violated plaintiff's civil rights, were intentional, willful, wanton, deliberate, malicious, and in bad faith.

40. Plaintiff is entitled to punitive damages from the individual defendants, William P. Angrick II, Michael J. Ferjak, Susan E. Voss, and James Peterson, individually.

41. Plaintiff is entitled to reasonable attorney fees on his claim as provided by law.

THEREFORE, plaintiff respectfully requests judgment against the defendants, William P. Angrick II, Michael J. Ferjak, Susan E. Voss, James Peterson, Citizen's Aide/Ombudsman, and State of Iowa, in an amount sufficient to fairly and reasonably compensate him for his damages, plus interest as provided by law, plus reasonable attorney fees as provided in the United States Code, and for punitive damages in an amount sufficient to deter them from engaging in like conduct in the future.


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the Attorneys of Record of all adverse parties in the above entitled cause by enclosing the same in an envelope addressed to each Attorney at his respective address as disclosed by the pleadings of record herein with postage fully paid, and by depositing said envelope in a United States Post Office depository in Sibley, Osceola County, Iowa on the 24 day of Aug 1979

Darryl K. Korman

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July 14, 1989

M E M O R A N D U M

TO: Representative Connors, Chairman, Service Committee
FROM: Richard Johnson, Legal Division Chief
RE: Legal Experts Regarding Item Veto Authority

I contacted the National Council of State Legislatures and the Council of State Governments regarding their knowledge of experts in the field of gubernatorial item veto authority.

The contact person at NCSL, Brian Weberg (303/523-7800), identified Tony Hutchison of NCSL and Louis Fischer of the Congressional Research Service as the authors of an article in NCSL's State Legislatures magazine on the item veto authority in the January issue (the article is attached). Louis Fischer in turn was contacted and recommended the following two experts in the field:

Neal Devins, an attorney and professor at William and Mary College (804/253-550(W), 229-2028(H)).

Calvin Bellamy, the President and CEO of Calumet National Bank in Hammond, Indiana, an attorney and Michigan Law School graduate.

The Council of State Governments' contact person, Bill Voit (606/231-1830), suggested that we might want to contact the American Bar Association or perhaps Alan Rosenthal at Rutgers University and will be sending the following information:

A Louisiana survey of the item veto authority in the fifty states.

An article by James Gosling, University of Wisconsin in

Madison, in Public Administration Review on the item veto.

An article by Regina K. Brough, Duke University's Governors Center on the item veto.

Covers from briefs submitted in a recent Wisconsin Supreme Court case on the item veto. The case is #87-1750-OA, Wisconsin Senate and Assembly vs. Governor Tommy Thompson and James Clauser, Secretary Administration, with the appellants' attorneys, LaFollette and Sinykin, Suite 300, 222 W. Washington Ave., P.O. 2719, Madison, Wisc., 53701-2719. State Senator contact: Fred Risser, State Senator (608/266-1627).

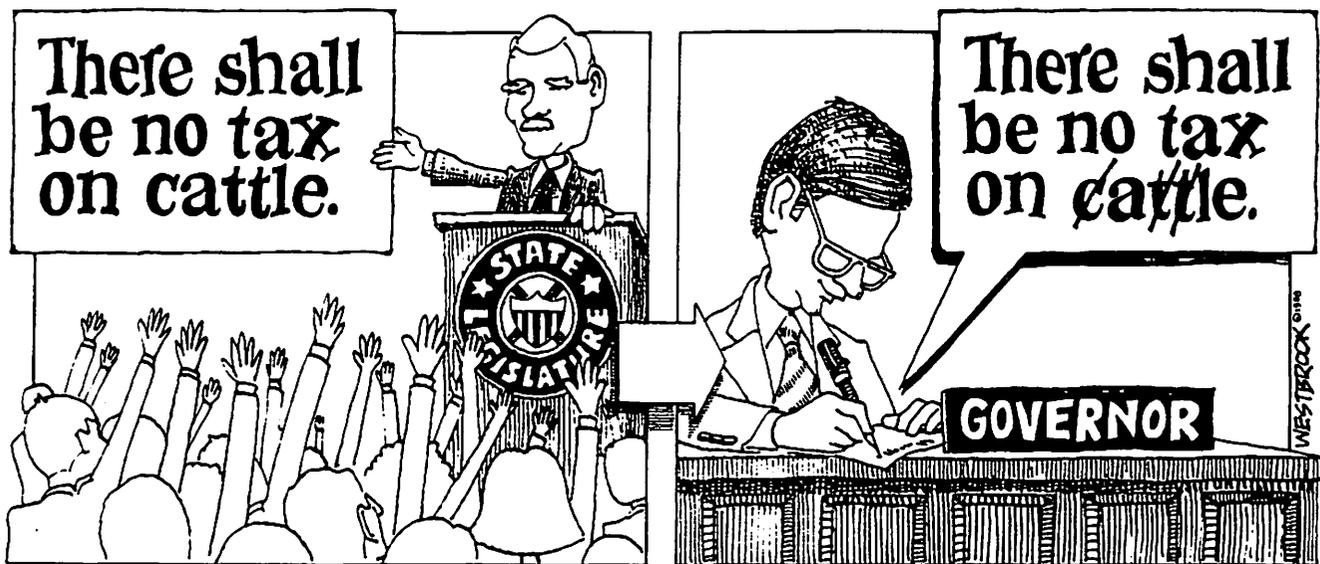
An article by Joseph Zimmerman on the item veto in New York.

If the Service Bureau can provide additional assistance in this matter, please let me know.

RJ/463b

Legislating Via Veto

Conceived as a legitimate tool for restraining state spending, the item veto is now regularly used as a tool of gubernatorial policymaking, and is often used to undermine the intentions of the legislature.



By Tony Hutchison

Wisconsin's veto king, Governor Tommy Thompson, defended his 290 partial vetoes in the 1987 budget bill by telling taxpayers that the Legislature was wasting their money. In reality, many of Thompson's vetoes don't save much money. Instead, they impose the philosophy of a governor of one party on a legislature controlled by the other party. And it's not just happening in Wisconsin. It's happening in California, New Jersey and Oklahoma and many more of the 40 states that allow the item veto.

Looking at 542 item vetoes exercised by Wisconsin governors between 1975 and 1985, University of Wisconsin political scientist James Gosling found that they were "used primarily as a

tool of policymaking and partisan advantage rather than fiscal restraint." While the item veto did reduce some government costs during the period studied, fiscal restraint did not appear to be the primary goal of the vetoes, Gosling said. He discovered that the highest total cuts to the general fund budget resulting from item vetoes ranged from .006 percent to only 2.5 percent.

Legislative and executive branch battles over the item veto have been under way virtually since its conception. Although different state constitutional provisions, and different courts interpreting those provisions, make comparisons around the nation difficult, it seems clear that conflicts over the item veto are on the rise again—especially when legislators believe a governor is using it to change the meaning of a bill. This is due in part to increasing fiscal pressures in many states that have made budget-

making more difficult than ever. But the real stimulus probably has more to do with the ascendancy of legislative bodies as state fiscal policymakers. Most state legislatures now have the resources to challenge the governor on nearly every issue relating to budget and taxes. In short, state legislatures now have the staff and information to carry out fully their constitutional roles in the appropriation process. This was not the case when the concept of the item veto was first introduced into state budgeting.

Authority for the item veto first showed up in the provisional constitution of the Confederate States. When the Civil War ended, several states wrote or amended their constitutions and the provision found its way into many of these. The idea continued to be a popular one due to a growing distrust of legislative institutions during the "Age of Spoils" that followed the Civil War. The item veto was seen as

Tony Hutchison is a senior staff associate in NCSL's Fiscal Affairs program. For further information see his Legislative Budget Procedures in the 50 States, published in September 1988 by NCSL.

a way to prevent pork-barrel politics and logrolling in state legislatures. The belief in its efficacy in curbing legislative abuses was further cemented into our political culture by subsequent good government and scientific management movements that emphasized executive branch competency and efficiency and disdained legislative branch politicking.

Today, executive branch competency can hardly be argued as a valid reason for placing additional fiscal powers in the hands of a governor. That argument is out-of-date, given the last 25 years of professionalization of state legislatures. Logrolling and pork-barrel politics remain problems, but governors are just as likely as legislators to become involved in such political schemes. And no matter what history intended, modern governors have turned a tool of fiscal restraint into a tool of one-upmanship.

Many legislatures put policy language in appropriations bills to direct the spending of state money in a certain fashion or to impose reporting requirements on the executive branch in conjunction with a particular appropriation.

Increasingly governors are using their item veto powers to remove these policy directives rather than to delete actual appropriations. This trend often has partisan overtones. "The line-item veto is more likely to be used where the governor of one party faces a legislature wholly or partially controlled by the opposite party," say political scientists Glen Abney and Thomas Lauth in a study for the *Public Administration Review*. They found this to be true for both Democratic and Republican governors. The study concludes that the partisan use of the item veto "probably has had a minimal effect on making legislatures or state government more fiscally restrained."

The item veto, through its active use or the threat of its use, can be an instrument of fiscal restraint, since getting the two-thirds vote needed for an override of many marginal programs is harder than getting a simple majority. On the other hand, legitimate democratic processes can be frustrated by a governor who uses the item veto power to remove legislative intent. In such cases governors often do not delete or reduce appropriations at all but simply detach the spending controls that legislatures have attached

to appropriated dollars.

Oklahoma Governor Henry Bellmon did this in 1988 when his numerous vetoes set a state record. Bellmon actually removed language expressing conditions of appropriations rather than the appropriations themselves. In doing so he cancelled a great deal of the legislature's oversight authority over those appropriations. In one case, an agency received \$2 million and no direction on how to spend it—"the governor had vetoed the spending provisions," said Jerry Johnson, a fiscal analyst with the Oklahoma Senate. This leads to two major problems Johnson said—too much spending discretion for non-elected executive branch officials and reduced oversight capabilities by the legislative branch. "It's difficult to evaluate a program's effectiveness when there was never any intent given for its funding," he says.

The most extreme case of modifying legislative intent occurred in Wisconsin during the 1988 session. Unlike any other state, Wisconsin allows a "partial" veto, giving the governor the opportunity to make up new words with an assortment of letters left from vetoed sections of budget bills. Protesting against 37 of Governor Thompson's 290 item vetoes, the Legislature took him to court, pointing to sections of the bill where he had used the partial veto to change the intent of the legislation. For example, he changed the length of time a juvenile can be held in a secure detention facility or juvenile portion of a county jail from 48 hours to 10 days—more in keeping, legislators say, with the governor's tough stance on crime than any desire for fiscal restraint.

Wisconsin's high court, however, sided with the governor, saying that his partial veto power extends to individual letters, spaces and even punctuation marks in an appropriations bill. This creates a situation where the governor can not only change legislative intent by deleting items but can actively create new intent by forming new words. For instance, the phrase "there shall be no tax on cattle" could become "there shall be no tax on ale" by striking the t's and the c in cattle.

"Jefferson and Adams would be rolling over in their graves if they knew what this court has done," said Rep-

resentative Marlin Schneider, co-chairman of the Wisconsin Joint Finance Committee.

The court upheld the governor's "creative veto" by a 4-3 vote. Wisconsin Justice William Bablitch, a former Democratic Senate majority leader, wrote the dissenting opinion. He argued that the constitution was not meant to allow such actions by the governor and that the majority's legal reasoning "strains the English language beyond the breaking point."

The majority of the court ruled that the governor could strike any letters, spaces and punctuation he liked, "so long as the net result of the partial veto is a complete, workable bill which the legislature itself could have passed in the first instance." The only restraints on the governor's powers are whether the result of his veto is a "complete, entire, workable law, and whether new language remained germane to the appropriation bill."

Representative Schneider sees numerous abuses to democratic processes coming out of this decision. "A governor who is clever and determined, as is ours, can unilaterally create new law with the consent of one-third of one house of the legislature. I have a hard time believing this is what the people intended when they approved the item veto."

The Wisconsin case is an anomaly in the sense that other state courts are not likely to follow the reasoning regarding individual letters and spaces constituting parts or items in an appropriation bill. It is important, however, in that it represents a line of legal reasoning that holds that item vetoes by their nature may change legislative intent—a view diametrically opposed to the traditional view that the item veto should only delete or reduce appropriations, and never have any creative qualities.

In a 1984 case (*Karcher and Orechio vs. Kean*), before an appellate court in New Jersey, Justice Robert Matthews wrote in a decision siding with New Jersey Governor Thomas Kean, "The exercise of the line-item veto power also gives the governor power to shape governmental policy. Unquestionably, the exercise of the line-item veto will alter legislative intent, at least insofar as it is expressed in an appropriation at the time the budget initially passes the Legislature."

Other state courts have been less

generous in their interpretation of gubernatorial veto power. The California Supreme Court in the 1987 case *Harbor vs. Deukmejian*, which involved the item veto of language directing the expenditure of AFDC appropriations, said, "Unless permitted by the constitution, the governor may not exercise legislative powers." The California high court relied on legal reasoning which takes the literal meaning of the word veto from the Latin "I forbid." The court ruled that

any veto should have the effect of "frustrating an act without substituting anything in its place."

The court went even further and said that in cases that involved an item veto of substantive language directing an appropriation, the governor's veto power extended only to the item of appropriation and not to the language directing the expenditure of that money.

Ample evidence is available to show that executive branch use of the item

veto can create problems as bad as those it was designed to cure. It may be time for some states to redesign their item veto to fit the politics of today. As a local New Jersey editorial writer put it following the court decision in favor of broadening that state's executive veto power, "Governors are free now to wreak havoc with legislative appropriations and let the devil take the hindmost. If the constitution means what the court says it means, it needs to be changed." 

A Presidential Item Veto?

The debate over the presidential item veto is heating up again. George Bush echoes what Ronald Reagan has been saying for eight years. The item veto can be a major fiscal policy tool in reducing the national deficit. Governor Dukakis has used his item veto power on numerous occasions in Massachusetts and stated during the campaign that the president should also have this authority.

No doubt debate will continue over whether the item veto can have a significant impact on federal spending. Proponents of the measure point to the fact that 43 governors have an item veto and suggest the president needs the same authority. Opponents say empirical evidence at the state level indicates that the item veto will have little if any effect on federal spending.

But while the state experience with the item veto may have some application to the federal situation, several features of the federal budget would make the item veto difficult to implement effectively even if the president were to be granted the authority.

First, a large share (more than 40 percent) of the federal budget constitutes "entitlement programs" such as Social Security, Medicare and federal pensions. This portion of the budget would be immune from a presidential item veto, because entitlements represent a binding legal obligation upon the federal government, that can be changed only by amending substantive law. Reducing or striking appropriation amounts would not reduce obligations.

Second, interest payments on the national debt are projected to be 14 percent of the budget for fiscal year 1989 and this portion of the federal budget is also off-limits to the item veto. This leaves less than 50 percent of the federal budget susceptible to the item veto; any significant reductions would have to come from the remaining portion of the budget.

But the biggest obstacle to implementing the item veto at the federal level effectively, according to Louis Fisher, a noted expert on the federal budget process with the Congressional Research Service, is that "there are no items to veto."

Unlike many states, Congress mainly appropriates lump sums. According to Fisher, "even if the president had item veto power, he would be unable to eliminate the boondoggles and pork. Congress does not put pork-barrel projects in the bills presented to the president." Most line items are contained in conference committee reports, thus leaving the president nothing to veto. While the appropriation items contained in the conference committee reports are "non-binding" in a legal sense, agencies' pragmatic relationships with committees prevent them from allocating funds in a different manner than envisioned by Congress.

The 1985 Energy and Water Development Appropriations Bill is a prime example, Fisher says. The bill is loaded with "pork projects" for the Corps of Engineers, the Bureau of Reclamation, the Appalachian Regional Commission and other agencies. But Fisher says,

"Take a closer look at the bill," which Reagan signed into law. Under the Corps of Engineers is an appropriation account titled Construction General. It contains the lump sum of \$864.5 million for rivers and harbors, flood control, shore protection and related projects authorized by law. The paragraph contains some earmarkings of funds for a few specific projects that add up to \$32.8 million. "What about the remaining \$831.7 million? How is it to be spent? On anything the president wants? No, it is to be spent on projects authorized by law and the projects identified in the conference report on the Energy and Water Development Appropriations Bill," said Fisher.

President Reagan could not have vetoed projects in that appropriation because they were not presented in the bill.

"Granting the president an item veto is a legitimate topic for debate," Fisher stated, "but the issue should not be obscured and confused by misconceptions. Before we can improve our budgeting system, we must understand it."

(For a more detailed discussion of this topic see: "Item Veto: State Experience and Its Application to the Federal Situation," Committee on Rules, U.S. House of Representatives, 99th Congress, Second Session, December 1986. Available through the Superintendent of Documents, Congressional Sales Office, U.S. Government Printing Office, Washington D.C. 20402)

—Tony Hutchison

The Hard Choices in Mental Health Care • From Statehouse to Congress

State Pension Funds: How to Invest \$18 Billion a Year



State Legislatures

April 1982
National Conference
of State Legislatures

When the Legislature Goes to Court



LITIGATE!

TELL IT TO THE JUDGE!

WE'VE BEEN SUED!

SEE YOU IN COURT!

WE'LL SUE!

OUR POWERS ARE AT STAKE!

... AND FURTHERMORE, COUNSEL INFORMS ME THAT UNDER 396(S)(1)... AND OF UNDER THE RULE IN I SUFF... THE GOV^T AUTHORITY IS OUR STANDING APPOINTM^T MATTER IS BEHIND COM^M BY DEMONSTRATED

Litigation has become a part of legislative life. In the past, legislatures have relied exclusively on the state attorney general to represent them—as the law often says they must. Now, some of them are hiring their own legislative counsels. That trend is likely to grow.

The State Legislature in Court

Inch for inch, pound for pound, lawyer for lawyer, Americans are the most litigious people on earth. Sooner or later, almost every social and political issue ends up in court. No person or institution is immune. Even the bodies that write the laws are finding their way to the courthouse.

State legislatures as plaintiffs have gone to court to assert their right to appropriate federal funds, challenge federal regulatory agencies, regulate the initiative process, prevent executive incursions into legislative prerogatives, and seek clarification of the process for amending the U.S. Constitution.

Legislatures have also been hauled into court as defendants. They have been told to explain their staff hiring practices and justify removal of legislators from committee and caucus positions. Legislative staff members have been subpoenaed to testify before grand juries and in lawsuits. The legislative process itself has been assaulted. No tradition can be taken for granted.

Lanny Proffer



The State Legislature

Legislators have always believed that what was said or done in the legislature could not be questioned elsewhere, and their view was supported by a tradition of immunity that can be traced back to the 17th century. Yet in 1980 the U.S. Supreme Court held that immunity did not apply when the federal government was investigating a state legislator (*U.S. v. Gillock* 445 U.S. 360 [1980]). Legislators also believed that their power to raise and appropriate money was absolute. Today, federal judges instruct legislatures under threat of contempt to appropriate whatever sums are necessary to implement judicial decrees.

It is clear from a reading of the state statutes governing the operation of the legislatures and the attorneys general of the states that legislatures were not considered potential litigants. This seems incongruous, since American political theory relies so heavily on the notion of carefully calculated checks and balances. From a contemporary perspective, it seems inevitable that arguments between branches of government occasionally ripen into lawsuits.

Many states have absolute prohibitions against any state agency, institution or individual representing the state or its officials. Arizona statutes designate the attorney general as the only legal counsel for the state. Outside counsel can be retained only with the attorney general's consent. The Connecticut attorney general is specifically directed to defend members of the legislature if any of their official acts are challenged.

In 1966, the Utah Legislature passed a bill that authorized the legislature to retain its own counsel. The attorney general challenged the statute, and it was declared unconstitutional by the state supreme court. Not until 1972, when the legislative article of the state constitution

was amended, could the Utah Legislature hire its own attorney.

Exclusion of the legislatures as litigants may have been based on the assumption that disputes between branches of government should be resolved by the political process rather than the courts. It may also have seemed that any sort of enforcement role, even if only to enforce a legislative prerogative, was inconsistent with the legislative function. Whatever the reason, the courts still have difficulty with legislatures as litigants.

Robert Coldsnow, legislative counsel for the Kansas Legislature, argues that without its consent the legislature has no existence for purposes of litigation. Individual members may sue or be sued; the legislature may not. Certain entities within the legislature have a legal existence; the legislature does not.

This lack of a clear party in interest causes confusion in the courts. When the Colorado General Assembly entered a suit against the Environmental Protection Agency, the U.S. Court of Appeals for the Tenth Circuit ruled that the named members of the legislature could not speak for the state and they lacked the requisite interest or "standing" in the case to be heard as individuals (*Mountain States Legal Foundation v. Costle* 630 F.2d 754 [1980]). To quote the court: "Even if state law permitted the petitioner legislators to press the state's constitutional claims . . . this court should not allow the legislators standing to raise claims that the state itself declines to raise and in fact opposes."

In that case, the legislature and the governor took contradictory positions. Governor Richard D. Lamm instructed Attorney General John D. MacFarlane to enter the case as his advocate. The court ruled that "the attorney general has the exclusive right to represent the state in actions to enforce its interest." It held that the legislators could not represent the interests of the state because to do so would be to pre-empt the power of the attorney general and the governor.

The court either did not understand or chose to ignore the claim that uniquely legislative powers were being threatened. Legislatures may not have standing to compel enforcement of the statutes they pass, but they definitely have the requisite interest in preserving legislative authority. Issues that fall into this category include confirmation of certain state officials, ratification of constitutional amendments, and the legislature's investigatory and information-gathering functions.

In *Coleman v. Miller* (307 U.S. 433 [1939]), the U.S. Supreme Court made it clear that state legislators challenging the procedure for ratification of constitutional amendments had sufficient interest in the outcome of the case to have their claim resolved. Similarly, U.S. Senator Edward Kennedy (D-Mass.) successfully argued before the

Six state legislatures have statutory authority to litigate issues of concern to them: California, Georgia, Kansas, Nevada, Oregon and Utah.

U.S. Court of Appeals for the District of Columbia that an allegedly improper Presidential veto sufficiently infringed the power of the Senate, and his rights as a senator, to establish his standing to sue.

Aside from its opinion in *Coleman v. Miller*, the Supreme Court has not ruled on the question of legislator standing. And although the *Coleman* ruling has been cited repeatedly, it has limited value as precedent, since the standing of the legislature was not directly at issue when the Supreme Court decided the case. Their comments on the legislators' right to sue were superfluous to the decision.

Traditionally, legislatures have relied on the state attorney general for legal assistance. There are only a handful of states where the attorney general is not specifically directed to give legal opinions to the legislature when asked to do so. In some states, such as Oklahoma and South Carolina, the attorney general is available as a bill drafter for the legislature. In New Hampshire, the attorney general can be asked for legal advice in addition to drafting assistance.

In some cases, however, relying on the attorney general to advocate and defend legislative priorities is unwise.

Worse still, the attorney general may be confronted with a conflict of interest. In the Colorado case cited above, where members of the legislature challenged the Environmental Protection Agency, and in Pennsylvania, where the legislature challenged the power of the governor to spend federal funds without a legislative appropriation (*Shapp v. Sloan* 391 A.2d 602), the attorney general opposed the legislature. In both cases, the legislature retained outside counsel and was ably represented. Nevertheless, these examples show that legislatures cannot rely on the state attorney general to represent their interests in all cases.

Congress has encountered similar problems in disputes with the executive branch. A case now on appeal to the Supreme Court (*Chada v. Immigration and Naturalization Service* [No.-1932]) tests the validity of the legislative veto. The U.S. Department of Justice, on behalf of President Reagan, argues that the legislative veto is an unlawful intrusion by Congress into an executive function. The recently established Office of Legal Counsel in the Senate is arguing the Senate position.

From time to time, every legislature faces an issue that requires it to assert its position in court. If these occasional lawsuits were the only basis for legislative counsel, it might be economic to retain outside counsel on a case-by-case basis. But many legislatures have found that legal questions now arise almost daily.

Legislatures have become big enterprises with large budgets, broad powers and extensive responsibilities.

They operate in a highly charged, contentious atmosphere. One would have to search to find any official legislative action that did not raise one or more legal questions. In similar circumstances, a private concern would have a battalion of lawyers. To be effective, the legislature must not only defend its prerogatives from all sides, but also exercise them to the fullest extent. A power not asserted is abdicated.

The legislative power to investigate, which lies at the heart of the lawmaking function, has been the subject of entire texts and innumerable court cases. The legislatures of Kentucky, Montana, Nebraska, and other states without statutory authority to litigate, do have express authority to go to court to enforce their subpoena power.

Not all threats to the legal authority of a legislature necessarily arise in the state or federal courts of the home state. Federal precedent applies in all cases under the federal system. A decision in a distant federal court may have profound effects beyond the parties to the litigation.

As mentioned earlier, the power of the Congress to veto certain administrative rules of federal agencies is before the U.S. Supreme Court. The same concerns that prompted Congress to provide for review of agency rules and regulations have been apparent in state legislatures, some of which have established procedures to review the administrative rules of state agencies. If the Supreme Court curtails congressional power in this area, attacks on similar state statutes are inevitable. Thus it can be important for the legislature to be heard even when it is not a party to the litigation.

The law recognizes the importance of such third parties and provides for their participation as *amicus curiae* or

In some cases, relying on the attorney general to advocate and defend legislative priorities is unwise. Worse still, the attorney general may be confronted with a conflict of interest.

"friend of the court." An institution, group or person with an interest in the outcome of a case may file a brief with the court, explaining its point of view and bringing to the court's attention the potential effects of the decision.

State attorneys general regularly join their colleagues in other states as *amici* in lawsuits when the outcomes might affect them. A recent Supreme Court case raised the question whether a local government might be subjected to punitive damages under a U.S. civil rights law (*City of Newport v. Fact Concerts, Inc.* 49 USLW4860 [1981]).

Many states intervened in the case as *amicus curiae* and the Court ruled that punitive damages could not be imposed upon the city. Because few legislatures have offices set up to handle such tasks, their participation in such cases is limited.

In states where the legislature has no legal counsel of its own, the main difficulty is that an outside counsel, who has been retained for a limited time and purpose, may not understand the nuances of the legislative process. Legislatures with legal counsels are able to accumulate legislative

States with In-House Legislative Counsels

State	Statutory Authority	Agency Approving Litigation	Scope of Litigating Authority	Other Duties	Authority to Retain Outside Counsel
California	Annotated California Code 10200 et. seq.	Joint Rules Committee or legislature by resolution.	No specific limitation other than authorization by Joint Rules Committee.	Bill drafting; and advice and counsel to legislature, drafting and advice for governor and state judges, code revision, preparation of initiative measures; statutory indexing and codification.	Yes
Georgia	Georgia Code Annotated 46-1203	Legislative Services Committee.	"Represent the interests of the Legislative branch in matters involving litigation."	Bill drafting; assist committees, advisory opinions; statutory and code revision; research.	Yes
Kansas	Kansas Statutes Annotated 46-1224	Legislative Coordinating Council when legislature is out of session. Either house by resolution when legislature is in session.	May represent legislature in "any cause or matter." Legislative Council has same mandamus and quo warrant powers and standing as attorney general.	Advisory opinions, counsel to special committees of legislature; provide investigative assistance upon request of committee chairpersons.	Legislative Coordinating Council may provide legal, investigative and clerical assistance to legal counsel as needed.
Nevada	Nevada Revised Statutes 218.690 et. seq.	Legislative Commission.	"To protect the official interests of the legislature or one or more legislative committees."	Bill drafting; advisory opinions; code revision; digest and annotate Supreme Court opinions; service on Commission on Uniform State Laws.	May contract for necessary services.
Oregon	Oregon Revised Statutes 173.111 et. seq.	Legislative Counsel Committee.	"To protect the official interests of the legislative Assembly, one or more committees, or one or more members."	Bill drafting; research; assist in preparation of initiative measures; code revision.	Yes
Utah	Utah Revised Statutes 36-12-14	Legislative Management Committee.	"Represent the legislature, any of its committees or subcommittees, or the professional legislative staff in cases or controversies before courts, administrative agencies and tribunals.	Bill drafting; advice and counsel to legislature; code revision; bill status.	No statutory authority.

experience and knowledge to complement legal experience. This experience and knowledge can be brought to bear in litigation even if outside counsel is retained for the actual trial.

Six state legislatures have statutory authority to litigate issues of concern to them: California, Georgia, Kansas, Nevada, Oregon and Utah. In each case, the selection of the legal counsel is nonpartisan and professional. The Kansas statute describes the qualifications and the selection process in detail. The Nevada statute requires membership in the state bar and expertise in "political science, parliamentary practice, legislative procedure, and the methods of research, statute revision and bill drafting."

Before the counsel in any state can initiate an action or enter his appearance in a lawsuit, the legislature must consent. In most states, the legislative counsel is a part of the legislative service agency and the supervising committee of legislators must give its consent before any action can be brought.

The legislatures have given their counsels broad power to litigate. The Oregon statute is typical: Legal action may be brought "when deemed necessary or advisable to protect the official interests of the legislative assembly, one or more legislative committees, or one or more members of the legislative assembly." The authorizing legislation for the Georgia counsel is broad and succinct: "to represent the interests of the legislative branch in matters involving litigation." Georgia and Oregon specifically provide for outside counsel as necessary; presumably the other states would permit such counsel as well if the particular litigation called for it.

Legislatures with offices of legal counsel have managed to get a lot of mileage out of them. Their duties, as spelled out in each state's enabling legislation, include far more than litigation. All are asked to provide legal counseling to legislators and legislative committees. Most are involved with bill drafting and service to investigative committees. The Nevada legislative counsel works with the National Commission on Uniform State Laws. In Oregon and California, the counsels are involved in the initiative processes. California, Utah and Nevada specifically assign code revision duties, including the development of recommendations for improvement and reform. Other states, such as Georgia and Nevada, assign "such other authority and duties as the committee may provide."

The office of legal counsel in the legislature is essentially analogous to that of the general counsel in a large corporation. Although there may be lawyers in many divisions, the ultimate responsibility in legal matters resides in the office of the general counsel. All litigation is channeled through

that office.

Some states have stopped short of creating an official legislative counsel but have assured that they have other knowledgeable counsel on legislative issues. New Jersey is an example. The New Jersey Senate and General Assembly retain majority and minority counsel who spend a substantial portion of their time representing the respective legislative bodies. During the remainder of their time they carry on the private practice of law. Their legislative responsibilities keep them current on legislative issues and the private practice gives them regular and continuous courtroom experience. These counsels do not, however, handle bill drafting and other legislative chores assigned to in-house counsels.

This kind of legal representation provides more flexibility for the leadership, according to Robert Smartt, deputy director of the New Jersey General Assembly. "Issues sometimes arise where only the majority has a substantial interest at stake," he said. "In those instances, counsel to the majority can respond quickly and effectively." Lawrence Marinari, majority counsel to the General Assembly, sees litigation as a growth industry in the state. "The more modernized and co-equal the legislature becomes," Marinari said, "the more often it is likely to be drawn into lawsuits. Representing the legislature could become a full-time job."

Perhaps the most important function of the legal counsel in a legislature is also the most subtle. Creation of the office signals to the other branches of state government and to the public at large that the legislature is prepared to defend its prerogatives and assert its powers to the fullest extent possible.

The legislature must be prepared to defend itself as an institution when it is challenged in a court of law. As a co-equal branch of government, the legislature must be prepared to use the courts as a sword as well as a shield. When necessary, legislatures must bring actions as well as defend them. They must also extend their vision beyond their own states to federal courts throughout the nation, and, as issues warrant, to let those courts know how their rulings might affect the states.

If there was ever a time when the legislature was a cloistered institution, that time has passed. In tomorrow's state legislatures, there may be fewer cries of "there oughta be a law"—and more of "I'll see you in court."



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July 19, 1989

MEMORANDUM

TO: REPRESENTATIVE JOHN CONNORS, CHAIRMAN, AND MEMBERS OF
THE SERVICE COMMITTEE OF THE LEGISLATIVE COUNCIL

FROM: John Fatino, Research Analyst *AF*

RE: Information Relating to Pregnancy, Maternity, and Family Leave

INTRODUCTION

Enclosed is an explanation of the following information relating to pregnancy, maternity, and family leave; the current Iowa House of Representatives', Iowa Senate's, and Iowa Central Legislative Staff Agencies' provisions; the terms of several collective bargaining agreements; the current Iowa Code and Iowa Administrative Code procedures for such leave; a table of other states' provisions; information from the National Conference of State Legislatures regarding bills introduced in other states in the family leave area; current Federal Law and the status of pending Federal Legislation. Finally, a copy of the Family Care provisions of a recent contract between C.W.A., I.B.E.W., and A.T.&T. are discussed.

All of these terms are condensed on the enclosed tables. Contained in an additional table are a comparison of other states' provisions prepared by Ms. Leslie Workman.

IOWA HOUSE OF REPRESENTATIVES RULES

Current House rules allow four consecutive months of leave following the birth of a child using accrued sick leave, compensatory time, and vacation. Employees may choose unpaid leave initially or use unpaid leave once other accrued times have expired. Also, the employee may use reduced work hours if the supervisor approves. The policy does not have a maximum limit on time.

The employee is given the right to return to the same job classification following leave with full seniority rights. Seniority accrues during the unpaid leave of absence. The policy applies to both parents in the case of adoption. The State still pays the employer's share of insurance benefits subject to certain stated limitations.

IOWA SENATE RULES

Initially, the Senate declares that "disabilities caused by pregnancy or recovery therefrom shall be covered by sick leave." The Senate also enumerates a Maternity Leave Policy.

The Maternity Leave Policy is available only to permanent, full-time female employees regardless of their length of service. The policy allows two weeks before birth and six to eight weeks post-birth depending on the type of birth. With a physician's statement, the period may be extended. No maximum is stated.

Accrued sick leave is to be used to cover the period of disability. When insufficient sick leave has been accumulated, the employee may use other accumulated times, use unpaid leave, or a reduced time work schedule with the supervisor's permission. A right of return and seniority are assured. However, if an unpaid leave is taken the employee must pay the entire premium (including the state's share). An employee does not accrue seniority while on unpaid leave.

IOWA CENTRAL LEGISLATIVE STAFF AGENCIES PERSONNALE GUIDELINES

The Legislative Council adopted the Personnel Guidelines on June 21, 1989. At that time it was decided that the Maternity Leave Policy and Family Leave Policy were effective only until July 19, 1989. Thus, discussion of these leave types cannot be considered permanent at this point.

The Personnel Guidelines do mention pregnancy and recovery from pregnancy as valid use of sick leave. C.L.S.A. Chap. 67(C) b(2). In addition, sick leave, not to exceed forty hours per year, may be used for care or children or immediate family members. Id. at subsec. (4).

The Service Committee, with minor variations, has tentatively adopted the Senate's Maternity Leave Policy. However, the Guidelines do not grant two weeks leave pre-birth. Chap. 6(C) 4(c). One other difference appears to be at Chapter 6(C) 4(e). The Personnel Guidelines do not stall seniority accrual if the employee takes an unpaid leave of absence. The Guidelines are similarly silent on the question of who bears the cost of insurance during this period.

PERSONNEL GUIDELINES TENTATIVELY ADOPT FAMILY LEAVE

Family leave is not limited to female employees. The leave may be used for care of immediate family members, including adopted children. This leave shall be used when the care need is in excess of five working days. C.L.S.A. Chap. 6(C) 5(a). Family leave may not exceed eight weeks. Accrued sick leave may be used. When insufficient sick time has accrued, the employee has the same options as under the Maternity Policy; use of other accumulated times, unpaid leave, or reduced time schedule. The Family Leave Policy is also silent on the questions of seniority accrual during an unpaid leave of absence and payment of the cost of insurance during such an absence.

COLLECTIVE BARGAINING AGREEMENTS CONTAINING SIMILAR PROVISIONS

Five collective bargaining agreements were reviewed. All were 1987-1989 agreements between the following, the Judicial Department of Iowa and the American Federation of State, County and Municipal Employees (AFSCME); the Judicial Department of Iowa and the Public Professional and Maintenance Employees; the State of Iowa and AFSCME; the State of Iowa and the Iowa United Professionals; and the State of Iowa and the State Police Officers Council.

All of the agreements had similar provisions relating to sick leave use for maternity situations. The agreement between the Judicial Department and AFSCME is typical. Employees are allowed to use accrued sick leave for personal illness which includes "medically related disabilities resulting from pregnancy and child birth..." (p.39-40). Also, accrued sick leave may be used to care for an ill or injured immediate family member not to exceed 40 hours (5 working days) per year. Accrued sick leave can also be used in a post-adoption situation not to exceed 40 hours as determined above.

Identical provisions regarding sick leave are contained in both the Public Professional & Maintenance Employees agreement, the State of Iowa-AFSCME agreement, the Iowa United Professionals agreement, and the State Police Officers Council.

However, the Iowa United Professionals agreement, and the State Police Officers Council do not contain the provisions regarding ill family members or adoption. Under these agreements, child birth is considered a valid use of sick leave.

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MATERNITY JUSTIFIES LEAVES OF ABSENCE

Several agreements also specifically mention maternity and correspondingly establish guidelines for the taking of a leave of absence without pay. In the agreement between the Judicial Department and AFSCME, the employee shall:

(a) give four weeks notice prior to her departure stating the probable duration of the leave,

(b) not take a period of time in excess of three months.

In addition, the employee may:

(a) take an additional three months provided the absence does not cause "substantial hardship" to the unit,

(b) with a doctor's statement be granted an extension in increments of thirty days not to exceed six months,

(c) in no case shall the total period exceed twelve months.

Identical language is contained in the Public Professional & Maintenance Employees agreement, and the State of Iowa-AFSCME agreement. The agreements also provide for a right of return to the same or similar job.

The Iowa United Professionals agreement has a leave of absence provision entitled "Parenting Leave." While similar to other agreements, this agreement allows a base period of six months for the initial leave and additional leave may be granted in thirty day increments not to exceed three months. Thus, under this agreement, an employee is eligible for a total of nine months leave. The agreement also contains "right of return" language.

The State Police Officers Council agreement has no provision for maternity leave as a valid reason for a leave of absence without pay. Consequently, no right of return language is present in the agreement.

In summary, several different collective bargaining agreements entered into by the other branches of state government allow sick leave to be used for maternity reasons. Also, a leave of absence without pay may be used with a right of return assuring the employee of a job when she returns (except for the State Police Officers Agreement.)

IOWA STATUTORY AUTHORITY

State of Iowa employees may use sick leave to cover maternity situations. Iowa Code section 79.1, unnumbered paragraph 5 (1989) allows employees to use accrued sick leave for "medically related disabilities including disabilities from pregnancy and childbirth". The Iowa Administrative Code further subdefines the requirements of maternity leave for state employees.

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IOWA ADMINISTRATIVE CODE UTILIZES BOTH SICK LEAVE AND LEAVE OF ABSENCE

The Iowa Administrative Code Department of Personnel provisions allow sick leave to be used to cover medically related disabilities caused by pregnancy or recovery from childbirth. Iowa Admin. Code r. 581-14.3(1) (1989). In addition, the employee may use either other accrued leaves once sick leave has been exhausted or may be granted leave without pay. Id. at r. 581-14.3(12) (1988). Leave cannot be granted in excess of twelve consecutive months. However, upon a second written request, the Director may grant an additional twelve consecutive months leave. Id. at r. 581-14.5(1) (1988).

The Administrative Code contains another provision that, while it is somewhat ambiguous, could be interpreted as allowing for additional or alternative maternity leave. Rule 581-14.5(4) (1989) allows the appointing authority, when requested in writing and "verified by the employee's physician or other licensed practitioner", to grant leave "either paid, unpaid or a combination of the two at the discretion of the employee, for at least an eight-week period when the purpose is to recover from a medically related disability." In an earlier section, the rules describe pregnancy or recovery from childbirth as a medically-related disability. Leave without pay will not be granted unless all accrued sick leave has been exhausted. Id. Also, the appointing authority may grant additional leave in excess of eight weeks. Id.

If an employee should choose a leave of absence, the employee has a right of return. Iowa Admin. Code r. 581-14.6 (1988). However, the employee must notify the agency that the employee is planning on returning. Also the employee will be placed in a "vacant position in the class held prior to leave or a class in the same pay grade for which the employee qualifies." Id. If no vacancy is available, the reduction in force provisions apply. As a result, it appears that the employee who opted for leave is not entitled to "bump rights" over other employees.

The Iowa Administrative Code Department of Personnel provisions go somewhat further than the collective bargaining agreements by providing up to two years of leave without pay. In the alternative, under the Administrative Rules the employee may get up to sixteen weeks paid or unpaid leave, depending upon the employee's selection of options.

OTHER STATES' PROVISIONS

The enclosed chart shows eleven other states' provisions relating to maternity leave. The eleven states (California, Connecticut, Kentucky, Louisiana, Massachusetts, Minnesota, Montana, Oregon, Rhode Island, Tennessee, and Wisconsin) appear to allow six to eight weeks on the average with a right of return to work. The states do vary on whether leave can be exercised for pregnancy or adoption. See the table for each state's specific provisions.

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Also enclosed is information from the National Conference of State Legislatures showing all legislation introduced in the fifty states relating to this subject area. Surprisingly, few bills seem to have been enacted. North Dakota and West Virginia were the only states to enact such legislation during the last session. See the packet for specific information on each state.

FEDERAL PROVISIONS

Federal law, 42 U.S.C. section 2000e, prohibits discrimination in employment on the basis of sex. This includes pregnancy. No parental leave provision has been adopted to date. In addition, the Federal Regulations provide that a policy which excludes employees because of "pregnancy, childbirth or related medical conditions as a prima facie violation of Title VII." 29 C.F.R. sec. 1604.10(a) (1988). In essence, such a policy is considered discriminatory and thus illegal on its face.

Currently, two bills are pending in Congress regarding mandated parental leave. According to information obtained on July 18, 1989, H. R. 770 was passed out of Committee on March 8th. The bill was placed on the House calendar on May 1st. S. 345 was voted out of Committee on April 19th. The bill was placed on the Senate calendar on July 3rd, but no further action has been taken. See the enclosed table for specific provisions of the bills.

A. T. & T. AGREEMENT

The Family Care provisions of the agreement between A.T.&T., C.W.A. and I.B.E.W. contain the following terms.

A. Child Care

The Company is engaging a referral service to locate and evaluate child care for children under thirteen. Selection and service costs are the responsibility of the employee.

B. Elder Care

The Company will engage a referral service to find elder care for persons sixty and over. Selection and service costs are the responsibility of the employee.

C. Dependent Care Reimbursement Accounts

These accounts allow full-time and regular part-time employees to exempt up to \$5,000 in wages a year from federal income and social security taxes. Essentially, the money saved goes into an account out of which expenses are paid for care of children under thirteen or elderly persons incapable of selfcare and who receive fifty percent of their support from an employee.

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D. Improved Newborn Care Leave

As of January 1990, leave for care of a newborn or adopted child is without pay and with approval may be extended to one year. The employee is guaranteed reinstatement to the same or equivalent job upon return. Certain language appears to allow both parents to take such leave. During that time, the company pays the premium on the Death Benefit and Basic Group Life Insurance. Payment on other programs varies.

E. Family Care Leave

Family care leave can be for twelve months in a two-year period with guaranteed reinstatement. The purpose of the leave is to care for a seriously ill family member. Premium costs are covered under the same terms as newborn care leave.

F. Adoption Assistance

Under this program, employees are eligible for reimbursement of expenses associated with legal adoption of a minor child. Reimbursement is up to a maximum of \$2,000.

For additional assistance or information, please contact Leslie E. Workman, Legal Counsel, at 515/281-3798.

Leave
jf/dg/20

attachments

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COMPARISON OF MATERNITY LEAVE PROVISIONS

C00220

* Group	Term of Leave	Types of Leave	Add'l time	Right of Return	Seniority	Insurance	Family Leave
Iowa House	4 consecutive months(1)	All accrued	Yes-LWOP or RWH	Yes	Accrues during LWOP	State pays employers half to a point.	Not stated
Iowa Senate	8 to 10 weeks includes 2 weeks pre-birth (1)	All accrued	No limit but Dr's statement required	Yes	Does not during LWOP	State pays but LWOP employees pay all.	Up to 40 hrs per year.
IOWA C.L.S.A.	8 weeks no prebirth (1)	Same as Senate	Same as Senate	Yes	Accrues during LWOP	"Benefits continue"	Sick leave up to 40 then Family Leave.
Collect. Bargaining	3 months not to exceed 12 months (3) (4)	LWOP only	Add'l 3 months then increments of 30 days up 6 months	Yes but possib.of lay off	No provision	All for 30 days only	40 hours per year and post adoption leave (2) (4)
Iowa Code	REQUIRES ONLY THAT SICK LEAVE BE ALLOWED FOR MEDICAL DISABILITIES RESULTING FROM PREGNANCY						
Iowa Admin. Code	Sick leave up to 12 mos	Sick then LWOP	Add'l 12 mos. for total of 24 months.	Yes	No provision	No provision	40 hours per year.
Other States	SEE MS. WORKMAN'S ENCLOSED CHART						
Federal Law	REQUIRES ONLY THAT POLICIES NOT DISCRIMINATE AGAINST DISABILITIES CONNECTED WITH PREGNANCY (See other table for pending Federal legislation).						
A T & T (5)	12 months	LWOP only	No	Yes	Retained but no accrual language	AT & T pays Death and Life plan as and 6 mos. of maternity. HMO.	Same exact

LWOP=Leave without pay. RWH=Reduced Work Hours

(1) No total maximum is stated. Maximum is determined only for the initial period.

(2) The Iowa United Professionals agreement and the State Police Officers Council does not contain this provision.

(3) Iowa United Professionals have a base leave of 6 months and may extended in 30 day increments. Total may not exceed 9 months.

(4) The State Police Officers Council has no provision for maternity leave. Thus, no right of return exists. Also, the agreement does not contain a family leave provision.

(5) Allows both parents to take newborn leave.

CHART OF STATE PROVISIONS

State	Stat./Reg.	Length of Leave	Return to Work Guarantee	Type of Leave
1. California	* Statute: Gov. * sec. 12945 * * *	* disability-not to * exceed 6 wks.; * maternity- not to * exceed 4 mos. * *	* yes * * *	* Disability/maternity and * can use vacation * *
2. Connecticut	* Statute: * 46a-60(a)(7) * *	* reasonable period * of time * *	* yes * *	* Disability leave and are * entitled to accrual benefits. * *
3. Kentucky	* Statute: * 337.015 * *	* up to 6 wks * *	* yes * *	* Adoptive leave * *
4. Louisiana	* Statute: chap. * 23 sec. 1008 * * *	* disability-up to 6 * wks.; maternity- * reasonable period of * time, not to exceed * 4 mos. * *	* yes * * *	* Disability/maternity and * can use vacation * *
5. Massachusetts	* Statute: * 105D * *	* up to 8 wks * *	* yes * *	* Maternity leave with or w/o * pay and entitled to accrued * benefits * *
6. Minnesota	* Statute: * 181.941 * *	* up to 6 wks unless * agreement for more * *	* yes * *	* Parental leave of birth or * adoption * *
7. Montana	* Statute: * 49-2-310 * *	* reasonable period; * can't force unrsnble * leave amount * *	* yes * *	* Pregnancy * *
8. Oregon	* Statute: * 659.360 * *	* up to 12 wks * *	* yes * *	* Parental (birth or adoption * of child under six) may use * sick or comp. time during leave * *
9. Rhode Island	* Statute: * 28-48-1 thru * 28-48-9 * *	* up to 13 wks in any * 2 yr. period * *	* yes * *	* Parental (birth or adoption * of child of sixteen or under * or serious illness of child) * and entitled to benefits * *
10. Tennessee	* Statute: * 4-21-408 * *	* up to 4 mos. * *	* yes * *	* Maternity leave for pregnancy, * childbirth, nursing and entitled * to benefits * *
11. Wisconsin	* Statute: * 103.10 * * * *	* 8 wks for birth or * adoption; 2 wks for * illness * * *	* yes * * *	* Family leave * * *

1987-1989

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COLLECTIVE BARGAINING AGREEMENT

Between
State of Iowa
and
American Federation of State,
County and Municipal
Employees, AFL-CIO



Iowa
a place to grow

MASTER CONTRACT

for the following bargaining units

Blue Collar
Clerical

Community Corrections
Professional Fiscal & Staff
Security
Technical

Effective: July 1, 1987 to June 30, 1989

JUN 28 1989

no cost to the employee) with an amount of group life insurance, plus an equal amount of group accidental death and dismemberment coverage, as indicated in the following schedule:

AGE	BASIC	AD & D
Under Age 65	\$10,000	\$10,000
Age 65 but less than Age 70	5,500	5,500
Age 70 and over	2,200	2,200

3. Each full-time employee will have the option of applying for additional life insurance coverage (to be paid by the employee) through payroll deductions as provided in the following schedule:

AGE	OPTION	
	I	II
	AMOUNT	AMOUNT
Under Age 65	\$5,000	\$10,000
Age 65 but less than Age 70	2,500	5,000
Age 70 and Over	1,000	2,000

4. Upon an employee's termination from state service, the life insurance policy may be converted to an individual policy of life insurance at the appropriate rates.

SECTION 5 Disability Insurance

The State agrees to continue the existing disability insurance programs within the various state departments and institutions for the duration of the Agreement. The State further agrees to continue to pay the entire cost for such disability insurance. For members of the bargaining unit, the qualifying period for eligibility for benefits under this

insurance is sixty (60) working days.

SECTION 6 Sick Leave

A. Accrual

All permanent classified bargaining unit employees of the State shall accrue sick leave at the rate of one day for each full month of service. Sick leave shall not accrue during any period of absence without pay.

B. Utilization of Sick Leave

1. Employees may use accrued sick leave for personal illness (both physical and mental), bodily injuries, medically related disabilities resulting from pregnancy and childbirth or exposure to contagious disease: (a) which require the employee's confinement; or (b) which render the employee unable to perform assigned duties; or (c) where performance of assigned duties would jeopardize the employee's health or recovery.

Personal illness as defined above may include medically diagnosed illness or disability resulting from work stress.

The Appointing Authority may require a medical certificate or other appropriate verification for absences covered by this Article.

Employees will be permitted to use compensatory time off and/or annual leave in lieu of sick leave when they so request. When a holiday falls while an employee is on paid sick leave, the employee's sick leave account shall not be charged for the holiday period.

2. Sick leave shall not be used for any reasons not specifically set forth above.

C. Sick Leave Accounts

The accrued sick leave shall be placed in an employee's sick leave account.

D. Cancellation of Sick Leave

Separation from state service shall cancel all unused accumulated sick leave. However, when an employee is laid off, any unused accumulated sick leave shall be restored, provided the employee is re-employed by any agency of the state within one (1) year.

E. Payment of Sick Leave Upon Retirement

Upon retirement, employees shall receive cash payment for accumulated, unused sick leave in both the active and banked sick leave accounts not to exceed a total of two thousand (2,000) dollars payable with the employee's final paycheck upon retirement.

F. Conversion Rights

1. All bargaining unit employees who have accumulated a minimum of thirty days (240 hours) in their sick leave account and who do not use sick leave for a full calendar month may elect to have one-half (1/2) day (4 hours), added to their accrued vacation account in lieu of adding one (1) day (8 hours) to their accrued sick leave account.

2. In the case of eligible permanent part-time employees, such conversion rights shall be prorated at the rate of two to one (one hour of vacation for every two hours of earned sick leave).

3. Employees who have made an election pursuant to this Section will be allowed to accumulate up to an additional twelve days (96 hours) beyond twice their annual vacation and unscheduled holiday entitlement.

4. Procedures for the implementation of this Section shall be governed, as provided in the directive issued August 10, 1978, by the State Comptroller, or as may be subsequently modified by the Iowa Department of Personnel.

SECTION 7 Paid Annual Leave of Absence (Vacations)

A. The Employer agrees to provide employees with a formal annual paid leave of absence plan (vacation) as set forth below.

B. Employees shall begin earning annual leave on their first day in pay status. Employees are eligible for and shall be granted annual leave as follows:

1. Permanent Full-time Employees

a. Annual leave shall be based on the date of hire and accrue at the rate of eighty (80) hours (10 days) each year for a full year of service during the first four (4) years of service; one hundred twenty (120) hours (15 days) each year for a full year of service during the next seven (7) years of service; one hundred sixty (160) hours (20 days) each year for a full year of service after eleven (11) years of service; one hundred seventy-six (176) hours (22 days) each year for a full year of service after nineteen (19) years of service; and two hundred (200) hours (25

If an employee is hospitalized while on his or her paid vacation, the portion of the paid vacation spent in the hospital may be rescheduled upon satisfactory proof of said hospitalization being provided to the Employer. The Employer agrees that employees will not be required to return to work during their vacation period.

SECTION 6. Sick Leave

A. Accrual

All permanent full-time bargaining unit employees of the State shall accrue sick leave at the rate established by the following chart:

Hours of Accrued Sick Leave	Rate of accrual
0 - 2,000	1 day a month
2,000 - 2,500	3/4 day/month
2,500 and up	1/2 day/month

Sick leave shall not accrue during any period of absence without pay. If an employee's hours of accrued sick leave drop to a lower category as established by the chart above, the employee shall earn sick leave at the appropriate accrual rate for that category.

B. Utilization of Sick Leave

1. Employees may use accrued sick leave for personal illness (both physical and mental), bodily injuries, medically related disabilities resulting from pregnancy and childbirth, or exposure to contagious disease: (a) which require the employee's confinement; or (b) which render the employee

unable to perform assigned duties; or (c) where performance of assigned duties would jeopardize the employee's health or recovery.

Sick leave may be granted only on satisfactory evidence of sickness or injury on the part of the employee. In the event the Appointing Authority has reason to believe an employee is abusing the sick leave privilege or may not be physically fit to return to work, the Appointing Authority may require a medical certificate or other appropriate verification. Employees will be permitted to use compensatory time off and/or annual leave in lieu of sick leave when they so request. When a holiday falls while an employee is on paid sick leave, the employee's sick leave account shall not be charged for the holiday period.

2. Where death occurs in the immediate family of the employee, accrued sick leave may be used, not to exceed twenty-four hours (3 working days) for each such occurrence. Immediate family is defined as, and limited to the wife-husband, child, parents, grandparents, foster children, brothers (and their spouses), and sisters (and their spouses) of the employee or spouse; aunts and uncles of the employee; or other relatives residing in the employee's immediate household.

3. Employees may use accrued sick leave for personal medical or dental appointments which cannot be scheduled at times other than during working hours.

4. Employees may use accrued sick leave for temporary emergency care of ill or injured members

of the immediate family (as defined in paragraph 2. above) for a limited period of time to permit the employee to make other arrangements. Use of sick leave for purposes of this Section is limited to five (5) days (40 hours) per year.

5. Sick leave shall not be used for any reasons not specifically set forth above.

C. Sick Leave Accounts

The first ninety (90) days (720 hours) of accrued sick leave shall be placed in an employee's active sick leave account. All additional accrued sick leave shall be placed in an employee's banked sick leave account. Sick leave in an employee's banked account may not be used until the active sick leave account is exhausted and only in the event the employee has an extended illness of at least five (5) working days in duration.

D. Cancellation of Sick Leave Separation from State service shall cancel all unused accumulated sick leave. However, when an employee is laid off, any unused accumulated sick leave shall be restored, provided the employee is re-employed by any agency of the State within one (1) year.

E. Use of Sick Leave

Upon retirement Upon retirement, including disability retirement, employees shall receive credit for all unused sick leave as follows:

Accumulated, unused sick leave in both the active and banked sick leave accounts shall be converted at current value and credited to the employee's account for the purpose of paying the cost of the monthly premiums of a health insurance and/or

life insurance policy.

Upon the death of an active or retired employee, the surviving spouse shall be entitled to the value of the sick leave bank in both the active and banked sick leave accounts as converted in the previous paragraph for the purpose of paying the cost of monthly premiums of a health insurance and/or life insurance policy for the employee's spouse or dependents.

F. Conversion Rights

1. All bargaining unit employees who have accumulated a minimum of thirty days (240 hours) in their sick leave account and who do not use sick leave for a full calendar month may elect to have four hours (4 hours) added to their accrued vacation account in lieu of adding twelve hours (12 hours) to their accrued sick leave account.

2. In the case of eligible permanent part-time employees, such conversion rights shall be prorated at the rate of three to one (one hour of vacation for every three hours of earned sick leave).

3. Employees who have made an election pursuant to this Section will be allowed to accumulate up to an additional twelve (12) days (96 hours) beyond twice their annual vacation and unscheduled holiday entitlement.

G. Work-Related Injuries In the event of a work-related injury (those injuries covered by the Iowa's Worker's Compensation Law) of at least five (5) days in duration, the employee shall be allowed to utilize up to sixty (60) days of paid leave per incident which shall not be charged against the active or

are required as a condition of employment to travel within the state on a regular basis shall be eligible for a permanent travel allowance as follows:

1. Employees whose in-state travel expense has averaged between \$100.00 and \$150.00 per month for the preceding twelve (12) months shall receive a permanent travel allowance of \$100.00.

2. Employees whose in-state travel expense has averaged over \$150.00 per month for the preceding twelve (12) months shall receive a permanent travel allowance of \$150.00.

The advance travel allowance shall be deducted from the employee's last paycheck upon separation from state service. Additionally, the Employer reserves the right to regularly review an employee's monthly travel expenses and should the employee fail to meet the above requirements, the advance travel allowance shall be withdrawn and deducted from the employee's next paycheck.

SECTION 10. Extra Pay

The Employer may, at its sole discretion, grant an incentive increase to bargaining unit employees, not to exceed three per cent (3%) of the employee's annual salary, providing that sufficient funds are available, in the Employer's estimation. The decision to grant or deny an incentive increase is not subject to the grievance procedure set forth in Article IV of this Agreement. Incentive increases which are granted shall be paid in one lump sum following the employee's performance evaluation and shall not be added to the base pay or carried over into subsequent evaluation periods.

ARTICLE X LEAVES OF ABSENCE

SECTION 1 Eligibility

Employees shall have the right to request a leave of absence in accordance with the provisions of this Article after the successful completion of their probationary period. Parenting leaves of absence shall be exempt from the waiting provisions of this Section.

SECTION 2 Request Procedure

Any request for a leave of absence shall be submitted in writing by the employee to the employee's immediate supervisor at least thirty (30) calendar days in advance whenever possible. The request shall state the reason for and the length of the leave of absence being requested.

The immediate supervisor shall furnish a written response as follows:

Requests for leaves of absence not exceeding one (1) month shall either be granted or denied within five (5) working days.

Requests for a leave of absence exceeding one (1) month shall either be granted or denied within fifteen (15) working days.

SECTION 3 Leaves of Absence Without Pay

Except as otherwise provided by this Article, employees may be granted leaves without pay at the sole discretion of the Appointing Authority for any reason for a period up to, but not exceeding one (1) year.

A. Parenting Leave

Employees shall be granted a leave of absence without pay at the time of birth or placement of an adopted infant or child as follows:

1. The employee shall, whenever possible, submit written notification to the immediate supervisor at least four (4) weeks prior to the start of the anticipated leave stating the probable duration of the leave. Such leaves shall be granted for a period of time up to, but not to exceed six (6) months. Upon request, additional parenting leave without pay may be granted in 30 day increments not to exceed a total of 3 months unless the absence of the employee would cause a substantial hardship on the operating efficiency of the employing unit.

2. In no case shall an employee be required to leave prior to childbirth unless she is no longer able to satisfactorily perform the duties of her position.

3. Except as provided under Article IX, Section 6 of this Agreement (Sick Leave), all periods of leave related to parenting shall be leaves of absence without pay.

B. Military Leave

Whenever an employee enters into the active military service of the United States, the employee shall be granted a military leave as provided under Section 29A.28 of the Code of Iowa and the applicable federal statutes.

C. Unpaid Educational Leave

It is the expressed intent of the Employer to promote continued education by employees of the

State and in furtherance of this policy, the State agrees to grant employees unpaid educational leaves of absence in accordance with the following procedure:

The Employer agrees that at any one time up to fifteen (15) bargaining unit employees of the Department of Human Services may be granted an unpaid educational leave of absence not to exceed two (2) years in duration. The Employer further agrees that at any one time up to three (3) bargaining unit employees of the Department of Education (Vocational Rehabilitation) and two (2) employees of the Department of Corrections may be granted an unpaid educational leave of absence not to exceed two (2) years in duration. Selection of employees shall be on the basis of seniority unless such selection would impose a substantial hardship on the delivery of services.

To be eligible for unpaid educational leaves, an employee must have completed eighteen (18) months of service. The Employer will not be required to permit more than two (2) employees to be on unpaid educational leave simultaneously from the same work unit.

D. Medical Leave of Absence

Employees with at least one (1) year of seniority who have exhausted their sick leave benefits shall be granted an unpaid leave of absence not to exceed ninety (90) calendar days provided the illness or injury exceeds ten (10) days and appropriate medical verification is submitted. Upon request of

the employee, extensions may be granted in increments for up to 90 days not to exceed a total of one (1) year. Such leaves may not be unreasonably withheld. Extension of such leaves shall not impair an employee's right to long term disability.

E. The Employer agrees to provide for the following rights upon an employee's return from any of the above approved leaves:

1. The employees shall have the right to be returned to the previously held position or one of like nature.

2. If the employee's position or one of like nature is not available, the layoff procedure set forth in Article VI of this Agreement shall be utilized; however, in the case of military leave, the employee will be given another position of similar pay and class for which the employee is qualified.

F. Except as otherwise provided in other provisions of this Agreement, all fringe benefits shall continue during any unpaid leave of absence which does not exceed thirty (30) days.

SECTION 4 Reduction in Force Leave

Upon the Employer's determination to layoff bargaining unit employees, the Employer will announce the number of bargaining unit employees in each layoff unit that will be laid off. The Employer will post the above announcement in each office of the affected layoff unit where bargaining unit employees are located for five (5) calendar days. No later than the fifth (5th) day of posting, permanent employees not designated for layoff and

who are in the same classification series affected by the layoff may apply for an unpaid leave of absence. The Employer shall grant such leaves, by seniority within class series and layoff unit up to the same number of employees as were scheduled for layoff. The number of employees to be laid off shall then be reduced by the number of leaves granted. The period of such leave shall be for one year, but may be extended by mutual agreement of the employee and the Employer.

Return from leave shall be in accordance with Article VI, Section 2(H)(2).

SECTION 5 Paid Leaves of Absence

A. Jury Duty

An employee on jury duty will be continued on the payroll and be paid his/her straight time hourly rate for his/her normally scheduled hours of work. Upon return from jury duty, the employee shall present evidence of the amount received for such jury duty and remit that amount to the Employer, less any travel or personal expenses paid for the jury service. If employees elect to use paid annual leave in lieu of work time for jury duty, they may retain the jury duty payment. Time spent in court and reasonable travel time shall be deducted from an employee's scheduled work hours for the day in question.

The employee summoned as a juror shall notify the Employer immediately by memorandum attaching a copy of the summons. The employee shall be responsible for all subsequent notifications

when obligated to report for jury duty.

An employee who reports to jury duty and is dismissed, shall promptly report to work for the remainder of the employee's working day, provided there are at least two (2) hours remaining in the scheduled work day.

B. Court Appearance

When, in obedience to a subpoena or direction by proper authority, an employee appears as a witness for the Federal Government, the State of Iowa, or a political subdivision thereof, or in a private litigation, the time spent shall be considered as a leave of absence with pay provided the employee is not a party to the proceedings. The employee shall remit witness fees to the Employer.

C. Paid Educational Leave

The Employer retains the sole discretion to either grant or deny requests for paid educational leaves of absence. Requests for paid educational leaves shall be submitted at least one hundred and twenty (120) days in advance of the requested leave. The Employer agrees to either grant or deny such requests at least sixty (60) days prior to the requested leave. Failure to respond within the designated time limits shall not constitute approval of such requests.

SECTION 6 Personal Leave Days

Employees will be permitted to use up to forty (40) hours (5 working days) of paid leave each fiscal year for the following specific reasons:

1. Where death occurs in the immediate family

of the employee, emergency leave may be used for each such occurrence. Immediate family is defined as, and limited to the wife-husband, child, parents, grandparents, grandchildren, foster children, brothers (and their spouses), and sisters (and their spouses) of the employee or spouse; aunts and uncles of the employee; or other relatives residing in the employee's immediate household.

Where a death occurs in the immediate family of the employee, as defined above, after exhaustion of the employee's personal leave days account, the employee may use accrued sick leave, not to exceed 3 working days for each such occurrence.

2. When an employee is a pallbearer in a funeral service for someone who is not a member of the employee's immediate family (as defined in paragraph 2 above).

3. Employees may use personal leave for personal medical or dental appointments (including reasonable travel time) which cannot be scheduled at times other than during working hours.

4. Employees may use personal leave for care of ill or injured members of the immediate family (as defined in paragraph 2 above).

5. Employees may use up to 16 hours of personal leave for reasons of personal importance to the employee with prior approval by the Employer. Every attempt will be made to grant the leave at the requested time.

Personal leave shall not be used for any reasons

converted to an individual policy of life insurance at the appropriate rates.

- B. Notwithstanding "A" above, Board of Regents employees will continue to be covered under the provisions of the group life insurance programs currently in effect at Regents institutions.

Section 6 Disability Insurance

The State agrees to continue the existing disability insurance programs within the various state departments and institutions for the duration of the Agreement. The State further agrees to continue to pay the entire cost for such disability insurance.

Section 7 Sick Leave

A. Accrual

All permanent classified bargaining unit employees of the State shall accrue sick leave at the rate of one and a half (1 1/2) days for each full month of service. Sick leave shall not accrue during any absence without pay.

The Employer and the Union will strive to develop a program in which employees may, at their sole discretion, select additional benefit options in return for reducing their sick leave accrual.

(Airport Firefighters see Appendix F-2.)

B. Utilization of Sick Leave

1. Employees may use accrued sick leave for personal illness (both physical and mental),

bodily injuries, medically related disabilities resulting from pregnancy and childbirth, or exposure to contagious disease: (a) which require the employee's confinement; or (b) which render the employee unable to perform assigned duties; or (c) where performance of assigned duties would jeopardize the employee's health or recovery.

The Appointing Authority may require a medical certificate or other appropriate verification for absences covered by this Article.

It is not the Employer's intent nor will the above language be construed in such a way as to constitute harassment of employees. This language is intended as a vehicle by which the Employer may scrutinize habitual sick leave usage or in those cases where sick leave abuse is suspected.

Employees will be permitted to use compensatory time off and/or annual leave in lieu of sick leave when they so request. When a holiday falls while an employee is on paid sick leave, the employee's sick leave account shall not be charged for the holiday period.

2. Where death occurs in the immediate family of the employee, accrued sick leave may be used, not to exceed twenty-four hours for each such occurrence. Immediate family is defined as, and limited to the wife-husband,

child, stepchild, parents, stepparents, foster parents, grandparents, grandchildren, foster children, brothers (and their spouses), step brothers, foster brothers, and sisters (and their spouses), step sister, foster sister, nieces, nephews, first cousins of the employee or spouse; aunts and uncles of the employee; or other persons who are members of the employee's household.

3. When an employee is a pallbearer or funeral attendant in a funeral service for someone who is not a member of the employee's immediate family (as defined in paragraph 2 above), accrued sick leave shall be used not to exceed one (1) working day for each such occurrence.
4. Employees may use accrued sick leave for personal medical or dental appointments which cannot be scheduled at times other than during working hours.
5. Employees may use accrued sick leave for care and necessary attention of ill or injured members of the immediate family (as defined in paragraph 2 above). Use of sick leave for purposes of this Section is limited to 40 hours (5 working days per year).
6. Employees may use accrued sick leave during adoption. Such leave shall not exceed five (5) working days.
7. Sick leave shall not be used for any reasons not specifically set forth above.

C. Sick Leave Accounts

The accrued sick leave shall be placed in an employee's sick leave account.

D. Cancellation of Sick Leave

Separation from state service shall cancel all unused accumulated sick leave. However, when an employee is laid off, any unused accumulated sick leave shall be restored, provided the employee is re-employed by any agency of the State within two (2) years.

E. Payment of Sick Leave Upon Retirement

Upon retirement, employees shall receive cash payment for accumulated, unused sick leave not to exceed a total of two thousand (2,000) dollars payable during the pay period preceding the employee's retirement date.

F. Conversion Rights

1. All bargaining unit employees who have accumulated a minimum of thirty days (240 hours) in their sick leave account and who do not use sick leave for a full calendar month may elect to have one half day (4 hours) added to their accrued vacation account in lieu of adding one and one-half days (12 hours) to their accrued sick leave account.
2. In the case of eligible permanent part time employees, such conversion rights shall be prorated at the rate of three to one (one hour of vacation for every three hours of earned sick leave).

3. Employees who have made an election pursuant to this Section will be allowed to accumulate up to an additional twelve days (96 hours) beyond twice their annual vacation and unscheduled holiday entitlement.

(Community Corrections see Appendix S-5.)

Section 8 Paid Annual Leave of Absence (Vacations)

A. The Employer agrees to provide employees with a formal annual paid leave of absence plan (vacation) as set forth below:

B. Employees shall begin earning annual leave on their first day in pay status. Employees are eligible for and shall be granted annual leave as follows:

1. Permanent Full-Time Employees

a. Annual leave shall be based on the date of hire and accrue at the rate of eighty (80) hours (10 days) each year for a full year of service during the first four (4) years of service; one hundred twenty (120) hours (15 days) each year for a full year of service during the next seven (7) years of service; one hundred sixty (160) hours (20 days) each year for a full year of service after eleven (11) years of service; one hundred seventy-six (176) hours (22 days) each year for a full year of service after nineteen (19) years of service; and two hundred (200) hours (25 days) each year for a full year of service after twenty-four (24) years of service.

b. Annual leave may be accumulated to twice the annual entitlement.

2. School Year Employees

Employees who are regularly employed on a school year basis for less than twelve (12) months out of a year shall be granted pro rata annual leave consistent with paragraph "1-a" above.

3. Permanent Part-Time Employees

Employees who are regularly employed for twenty (20) or more hours but less than forty (40) hours per week on a continuing basis shall be granted pro rata leave consistent with paragraph "1-a" above.

(Airport Firefighters see Appendix F-3.)

C. Annual leave credits in any given year shall not be earned for any period of absence without pay.

D. In scheduling vacation (annual leave), choice of time and amounts shall be governed by seniority as defined in Article V, provided employees submit their vacation requests at least sixty (60) calendar days prior to the requested time off. When vacation requests are not submitted sixty (60) days in advance, vacations will be granted on a first come, first served, basis. Vacation requests will be answered within five (5) working days from the date of receipt unless such requests are

CHAPTER 1
DEFINITIONS

[Prior to 11/3/86, Merit Employment Department(570)]

581—1.1(19A) Definitions.

"Absence without leave" means any absence of an employee from duty without specific authorization.

"Act" means Iowa Code chapter 19A creating the department of personnel.

"Agency" means a department, independent agency, or statutory office provided for in the Iowa Code section 7E.2.

"Appointing authority" means the appointed or elected chief administrative head of a department, commission, board, independent agency, or statutory office or that person's designee.

"Base pay" means a fixed rate of pay for an employee that is exclusive of shift or educational differential, special or extraordinary duty pay, leadworker pay, or any other additional special pay.

"Call back pay" means extra pay for eligible employees who are called to come back to work outside of their regular scheduled work hours, but not contiguous to the beginning or the end of their scheduled work hours.

"Career executive program" means that program which provides for permanent employees in positions covered by merit system provisions to apply for and to be used as a source of candidates for executive level positions not covered by merit system provisions.

"Certification" means the referral of available names from an eligible list to an agency for the purpose of making a selection in accordance with these rules.

"Certified disability programs" means that program covering persons with disabilities who have been certified by the vocational rehabilitation division of the department of education or the division for the blind of the department of human rights as being able to perform the duties of a job class without further examination. Persons covered by the program are not required to take examinations typically necessary for consideration for employment in a job class.

"Class" means one or more positions so similar in duties, responsibilities, and qualifications that each may be assigned to the same job title and pay plan.

"Classification plan" means the arrangement of job classes into levels and series.

"Class specification" means a description of the general duties and responsibilities normally assigned to positions in the same class, as well as the minimum qualifications required for positions in the class covered by merit system provisions.

"Commission" means the Iowa personnel commission, composed of five volunteer citizens appointed by the governor and confirmed by the senate for six-year terms.

"Compensatory leave" means leave time accrued for approved overtime worked.

**"Confidential employee"* means for purposes of merit system coverage the personal secretary of: an elected official of the executive branch or a person appointed to fill a vacancy in an elective office, the chair of a full-time board or commission, or the director of a state agency; as well as the staff in the office of the auditor of the state, and the staff in the department of justice except those reporting to the administrator of the consumer advocate division. *"Confidential employee"* means for purposes of collective bargaining any employee who works for the department, who has access to information subject to use in collective bargaining negotiations, or who works in a close continuing relationship with representatives associated with negotiating collective bargaining agreements on behalf of the state, as well as the personal secretary of: an elected official of the executive branch or a person appointed to fill a vacancy in an elective office, the chair of a full-time board or commission, or the director, deputy director, or division administrator of a state agency.

"Demotion" means the change of a nontemporary employee from one class to another having a lower pay grade. Demotions of permanent employees may be disciplinary, in lieu of layoff,

*Objection filed 12/2/86, see "Objection, 1.1" following.

or voluntary. Demotions of probationary employees may be disciplinary or voluntary.

"Department" means the Iowa department of personnel.

"Director" means the director of the Iowa department of personnel or the director's designee.

"Grievance" means an expressed difference, dispute, or controversy between an employee and the appointing authority, with respect to circumstances or conditions of employment.

"Immediate family" means the employee's spouse, children, grandchildren, foster children, stepchildren, legal wards, parents, grandparents, foster parents, stepparents, brothers, foster brothers, stepbrothers, sons-in-law, brothers-in-law, sisters, foster sisters, stepsisters, daughters-in-law, sisters-in-law, aunts, uncles, nieces, nephews, first cousins, corresponding relatives of the employee's spouse, and other persons who are members of the employee's household.

"Long-term disability" means a condition of an employee who is determined by the state of Iowa's long-term disability insurance carrier to be unable to work because of illness or injury.

"Merit system" means those positions or employees in the state personnel system determined by the director to be covered by the provisions of Iowa Code chapter 19A as it pertains to qualifications, examinations, competitive appointments, probation, and just cause discipline and discharge hearings.

"Minimum qualifications" means minimum requirements of education, experience, or other background needed to qualify for a job as published in a class specification, and pertains only to positions covered by merit system provisions.

"Nonpay status" means that period of time when an employee does not work during scheduled work hours and the work absence is not covered by any kind of paid leave. This includes employees who do not supplement workers' compensation payments with paid leave.

"Open competitive examination" means an examination which provides for competition among all persons who meet the minimum qualifications of a class, including state employees under the jurisdiction of the department.

"Overtime" means those hours that exceed 40 in a workweek for which an employee is entitled to be compensated.

"Overtime covered class, employee, or position" means a class, employee, or position determined to be eligible for premium overtime compensation in accordance with the federal Fair Labor Standards Act.

"Overtime exempt class, employee, or position" means a class, employee, or position determined to be ineligible for premium overtime compensation.

"Pay increase" means a periodic step or percentage increase in pay within the pay range for the class based on time spent, performance, or both.

"Pay plan" means one of the various schedules of pay grades and salaries established by the director to which classes in the classification plan are assigned.

"Permanent employee" means any executive branch employee (except board of regents employees) who has completed at least six months of continuous nontemporary employment. When used in conjunction with coverage by the merit system provisions referred to in Iowa Code section 19A.2A, unnumbered paragraph 3, it further means those employees who have completed the period of probationary status provided for in Iowa Code subsection 19A.9(8).

"Position" means a group of specific duties and responsibilities assigned by the appointing authority to be performed by one employee. A position may be part-time, full-time, temporary or permanent, occupied or vacant, or covered or not covered by merit system provisions.

"Premium rate" means compensation equal to one and one-half hours for each hour of overtime.

"Probationary employee" means any executive branch employee (except board of regents employees) who has completed less than six months of continuous nontemporary employment. When used in conjunction with coverage by the merit system provisions referred to in Iowa Code section 19A.2A, unnumbered paragraph 3, it further means those employees who have not completed the period of probationary status provided for in Iowa Code subsection 19A.9(8).

"Promotion" means the acceptance by a nontemporary employee of an offer by an appointing authority to move to a position in a class with a higher pay grade and may involve movement between positions covered by merit system provisions and positions not covered by merit system provisions.

At its November meeting the administrative rules review committee voted to object to that portion of 581 IAC 1.1 which relates to the definition of a confidential employee. It is the opinion of the committee this definition is unreasonable in that it overly restricts the availability of confidential secretaries. This definition appears as part of ARC 7103 and is published in IX IAB 10 (11-5-86).

This rule in pertinent part provides a confidential employee is the secretary of an elected official. All other secretaries are not defined as confidential and are protected by the merit provisions of Chapter 19A, Iowa Code. In the committee's opinion this definition is too narrow and should be broadened to include the secretary of the deputy official and the secretaries of the division heads.

The authority for this rule is found in Senate File 2175, section 205, which re-defined the exemptions from the merit system. Part of this re-definition included the elimination of the following language:

"3. Three principal assistants or deputies for each elective official and one stenographer or secretary for each elective official and each principal assistant or deputy thereof, also all supervisory employees and their confidential assistants."

While this specific exemption was deleted from Chapter 19A, S.F. 2175 added a generic exclusion for "all confidential employees." The committee believes that the deletion of section 19A.3(3) did not mean that all division level or higher secretaries were to be covered by merit. The committee believes that the re-write of section 19A.3 was intended to reduce the number of automatic exemptions (from twenty-four to seventeen) and to vest in the Personnel Department authority to create exemptions as needed in particular situations.

The committee feels that deputy and division level secretaries are within those "particular situations" where the department should provide an exemption by rule. Agencies headed by elected officials are unique. The management of those agencies is based on agenda developed by a political as well as administrative process. The highest level managers and their immediate staff should be directly accountable to the official who campaigned on that agendum and they should be expected to have some loyalty for that agendum.

"Reclassification" means the change of a position from one job class to another based upon changes in the kind or level of assigned duties and responsibilities.

"Red-circled salary" means an employee's salary that exceeds the maximum for the pay grade in the pay plan to which the employee's class is assigned.

"Regular rate of pay" means the total compensation an employee receives including base pay, shift or educational differential, special or extraordinary duty pay, leadworker pay, or any other additional special pay.

"Same pay grade" means those pay grades in the various pay plans having the same pay grade number as well as those pay grades using a three-step pay range where those steps correspond to the top three steps of a six-step range. A three-step pay grade shall be considered the same as the corresponding six-step pay grade in determining whether an action is a promotion, demotion, or transfer.

"Shift" means one segment of a 24-hour period in the work schedule of an appointing authority (e.g., day, evening, night shift).

"Shift differential" means extra pay for eligible employees who work shifts other than the day shift.

"Special duty assignment" means the temporary assignment of a permanent employee to a position in another class.

"Standby" means those times when eligible employees are required by the appointing authority to restrict their activities during off-duty hours so as to be immediately available for duty when required by the appointing authority, and is other than simply the requirement to leave word of their whereabouts in case of the need to be contacted.

"Temporary" means employment for a limited period of time, or employees with seasonal, emergency, intermittent, internship, trainee, or temporary status.

"Transfer" means the change of a nontemporary employee from one position to another position in the same class or to another class in the same pay grade.

"Veteran" means any person honorably separated from active duty with the armed forces of the United States who served in any war, campaign, or expedition during the dates specified in 1985 Iowa Code supplement section 70.1.

"Work time" means all hours spent performing the duties of an assigned job; travel between job sites during or after the employee's regular hours of work (where no overnight expenses are involved); rest periods allowed during the employee's regular hours of work; and meal periods when less than 30 consecutive minutes is provided.

"Workweek" means a regularly recurring period of time within a 168-hour period of seven consecutive 24-hour days.

This rule is intended to implement Iowa Code section 19A.9.

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**See IAB Personnel Department

**CHAPTER 14
LEAVE**

[Prior to 11/5/86, Merit Employment Department(570)]

581—14.1(19A) Attendance. Appointing authorities shall establish the working schedules, regulations, and required hours of work for employees under their direction. All regulations and schedules shall be made known to the affected employees by appointing authorities. All absences of probationary and permanent employees shall be charged to one of the leave categories provided for in this chapter.

581—14.2(19A) Vacation leave.

14.2(1) A probationary or permanent employee shall earn vacation for continuous state service as follows:

- a. Two (2) unscheduled holidays to be added to the vacation allowance each year.
- b. Two (2) weeks vacation during the first and through the fourth year of employment (80 hours plus 16 hours—3.69 hours for the first and second biweekly pay periods; 3.72 hours for the third biweekly pay period).
- c. Three (3) weeks vacation during the fifth and through the eleventh year of employment (120 hours plus 16 hours—5.23 hours for the first and second biweekly pay periods; 5.24 hours for the third biweekly pay period).
- d. Four (4) weeks vacation during the twelfth year and through the nineteenth year of employment (160 hours plus 16 hours—6.77 hours for the first and second biweekly pay periods; 6.76 hours for the third biweekly pay period).
- e. Four and four-tenths (4.4) weeks vacation during the twentieth year through the twenty-fourth year of employment (176 hours plus 16 hours—7.39 hours for the first biweekly pay period; 7.38 hours for the second and third biweekly pay periods).
- f. Five (5) weeks vacation during the twenty-fifth and all subsequent years of employment (200 hours plus 16 hours—8.31 hours for the first and second biweekly pay periods; 8.28 hours for the third biweekly pay period).

14.2(2) Vacation is subject to the following conditions:

- a. Vacation shall be subject to the approval of the appointing authority. The appointing authority shall approve vacation so as to maintain the efficient operation of the agency; take into consideration the vacation preferences and needs of the employee; and make every reasonable effort to provide vacation to prevent any loss of vacation accrual.
- b. Probationary and permanent part-time employees shall accrue vacation in an amount proportionate to that which would be accrued under full-time employment.
- c. Vacation shall not accrue during any absence without pay.
- d. An employee who is transferred, promoted, or demoted from one state agency to another shall be credited with the vacation accrued.
- e. An employee who leaves state employment for any reason shall be paid, or have payment made according to law, for all accrued vacation. Payment shall be included with the employee's final paycheck and shall be based on the employee's total biweekly regular rate of pay at the time of separation. When other than base pay is to be included that other pay must have been in effect for at least three pay periods. Vacation shall not be granted after the employee's last day of work.
- f. An employee may, at the appointing authority's discretion, be required to use all accrued vacation before being granted any leave without pay, except as otherwise provided in these rules.
- g. Vacation shall be charged on the employee's workday basis. Officially designated holidays occurring during an employee's vacation shall not be counted against the employee's accrued vacation.
- h. In the event of an illness or disability while on vacation, that portion of the vacation spent under the care of a physician shall be switched retroactively to and charged against the employee's accrued sick leave upon satisfactory proof from the physician of the illness or disability and its duration.
- i. Vacation shall not be used in excess of the amount accrued.

j. Vacation shall be cumulative to a maximum of twice the employee's annual rate of accrual, including sick leave conversion. An appointing authority may require an employee to take vacation whenever it would be in the best interests of the agency. The employee shall be given reasonable notice of the appointing authority's decision to require the use of accrued vacation. However, an employee shall not be required to reduce accrued vacation to less than eighty (80) hours.

k. One (1) week of vacation shall be equal to the number of hours in the employee's normal, regular workweek.

l. Any employee who is laid off, and subsequently returns to state employment within two years following the date of separation, shall have previous continuous service and the period of separation counted toward the vacation accrual rate. Employees who decline recall and employees who are rehired but subsequently terminate are ineligible for prior service credit if later reemployed during that same two-year period.

m. An employee who was terminated due to a long-term disability or a job-related illness or injury and applies for recall under subrule 11.3(6), and subsequently returns to state employment within two years following the date of medical release, shall have previous continuous service and the period of time from the date of medical release counted toward the vacation accrual rate.

n. Time spent in military service, within the specified time limits of the military training and service Act, shall be considered continuous service for the purpose of computing vacation accrual, provided the employee returns to state service within ninety (90) calendar days following discharge from military duty. Vacation shall not accrue to an employee while on military leave without pay.

581—14.3(19A) Sick leave with pay. Probationary and permanent employees shall accrue sick leave at the rate of one and one-half (1½) days (5.54 hours for the first and second biweekly pay periods, and 5.52 hours for the third biweekly pay period) for each complete month of full-time employment. The use of sick leave with pay shall be subject to the following conditions:

14.3(1) Accrued sick leave may be used during a period when an employee is unable to work because of medically related disabilities; for physical or mental illness; medical, dental or optical examination, surgery or treatment; or when performance of assigned duties would jeopardize the employee's health or recovery. Medically related disabilities caused by pregnancy or recovery from childbirth shall be covered by sick leave.

14.3(2) Sick leave shall not be used as vacation.

14.3(3) Sick leave shall not be granted in excess of the amount accrued.

14.3(4) There is no limit on the accumulation of sick leave. An employee who is eligible for vacation and sick leave benefits, and who has accrued 240 hours of sick leave may elect to accrue additional vacation in lieu of the normal monthly sick leave accrual. The conversion shall be on the basis of one hour of vacation for three hours of sick leave, for each full month when sick leave is not used during that month. An employee's maximum vacation accrual may be increased under this subrule up to 96 hours.

14.3(5) In all cases when an employee has been absent on sick leave, the employee shall immediately upon return to work submit a statement that the absence was due to illness or other reasons stated in this rule. Where absence exceeds three (3) working days, the reasons for the absence shall be verified by a physician or other authorized practitioner if required by the appointing authority. An appointing authority may require verification for lesser periods of absence and at any time during an absence. In all cases, sick leave shall not be deducted from that accrued until authorized by the appointing authority.

14.3(6) Sick leave shall be charged on the employee's workday basis. Officially designated holidays occurring during an employee's sick leave shall not be counted against the employee's accrued sick leave.

14.3(7) Sick leave shall not accrue during any absence without pay.

14.3(8) Probationary and permanent part-time employees shall accrue sick leave in an amount proportionate to that which would be accrued under full-time employment.

14.3(9) An employee who is transferred, promoted, or demoted from one agency to another shall be credited with the sick leave accrued.

14.3(10) All accrued sick leave shall expire on the date of separation and no employee shall be reimbursed for accrued sick leave unused at the time of separation except as provided for in Iowa Code section 79.1. However, if an employee is laid off and is reemployed by any state agency within one year following the date of layoff, or if an employee who was terminated due to an on-the-job injury or illness and is reemployed by any state agency within one year following the date of medical release, the employee's unused accrued sick leave shall be restored unless the employee received a payout of some or all accrued sick leave.

14.3(11) Employees may also use accrued sick leave, not to exceed a total of 40 hours per fiscal year, for the following purposes:

a. When a death occurs in the immediate family;

b. For the temporary care of members of the immediate family.

This leave shall be granted at the convenience of the employee whenever possible and consistent with the staffing needs of the appointing authority.

14.3(12) If an absence because of illness, injury or other proper reason for using sick leave provided for in this rule extends beyond the employee's accrued sick leave, the appointing authority may require or permit additional time off to be charged to any other accrued leave except that employees shall, upon request, be paid accrued vacation and compensatory leave in a lump sum to prevent delay of long-term disability benefits. When all accrued sick leave has been used, the employee may be granted leave without pay or terminated except as provided in subrule 14.5(4). Leave without pay for temporary disabilities for medically related reasons shall be in accordance with rule 581—14.5(19A), prior to termination.

14.4 Rescinded IAB 5/18/88.

581—14.5(19A) Leave without pay. A permanent or probationary employee, on written request and written approval by the appointing authority, may be granted leave without pay for any reason deemed satisfactory to the appointing authority, subject to the following conditions:

14.5(1) Leave without pay shall not originally be granted for more than 12 consecutive months. Accrued leave need not be exhausted before leave without pay is granted except that accrued sick leave must be exhausted if the reason for leave without pay is due to a medically related disability. The determination to require the exhaustion of any or all accrued leave shall rest with the appointing authority except as provided in subrule 14.5(4). On written request, prior to the expiration of a granted leave, the appointing authority may, in writing, grant an extension of the leave without pay. The approved leave without pay extension may not be for more than an additional 12 consecutive months, unless otherwise approved by the director.

14.5(2) Failure by the employee to report back to work on the date specified in the written request shall be considered a voluntary resignation unless otherwise approved by the appointing authority. A written statement accepting the resignation shall be sent to the employee by the appointing authority and a copy sent to the director.

14.5(3) Employees who do not supplement workers' compensation with sick leave, vacation or compensatory leave, and who are kept on the payroll in a nonpay status for more than 30 calendar days, shall be placed on leave without pay for purposes of probationary periods, pay increase eligibility, and other benefits. A written statement to this effect shall be sent to the employee within three days following the action by the appointing authority.

14.5(4) When requested in writing and verified by the employee's physician or other licensed practitioner, an employee shall be granted leave, either paid, unpaid or a combination of the two at the discretion of the employee, for at least an eight-week period when the purpose is to provide recovery from a medically related disability except that leave without pay shall not be granted unless accrued sick leave has been exhausted. The appointing authority may grant leave in excess of the eight-week period. Paid leave shall not be granted in excess of that accrued. At any time during the period of leave the appointing authority may require that the employee submit written verification of continuing disability from the employee's physician or other licensed practitioner. In addition to the reason listed, subrule 14.5(2) shall also apply under the following circumstances:

- a. The employee fails or refuses to supply the requested verification of continued disability.
- b. The verification does not clearly show sufficient continuing reason that would prevent the performance of the employee's regular work duties.
- c. The employee is shown to be performing work which is incompatible with the purpose for which the leave without pay was granted.

581—14.6(19A) Rights upon return from leave without pay, military leave, Olympic leave or educational leave. The employee must notify the agency or institution where employed prior to the leave of the intent to exercise return from leave rights. Upon return from leave the employee shall have the right to return to a vacant position in the class held prior to the leave or to a class in the same pay grade for which the employee qualifies. If a vacant position is not available, the reduction in force provisions of 581—Chapter 11 shall apply. The employee may return to work sooner than the approved leave expiration date if approved by the appointing authority. Except for military leave or educational leave required by the appointing authority, the pay increase eligibility date shall be adjusted for the period of leave without pay to a later date if the period of leave without pay exceeds 30 calendar days.

581—14.7(19A) Compensatory leave. Compensatory leave accrued in accordance with subrule 4.6(3) shall be granted at the convenience of the employee whenever possible. Accrued compensatory leave may, at the discretion of the appointing authority, be required to be used provided the employee is notified five (5) working days prior to the required usage.

581—14.8(19A) Holiday leave. Holidays shall be granted in accordance with statutory provisions to employees who are eligible to accrue vacation and sick leave.

14.8(1) The value of a holiday shall be equal to the number of hours the employee is scheduled to work, but not less than eight (8) hours for full-time employees. Compensation for holidays shall be prorated for employees who are scheduled to work less than eighty (80) hours in the pay period, based on the number of hours scheduled to work during the pay period in which the holiday falls. The hours scheduled for the holiday shall be included when determining the number of pro rata holiday hours.

14.8(2) For employees who work Monday through Friday, a holiday falling on Sunday shall be observed on the following Monday and a holiday falling on Saturday shall be observed on the preceding Friday. For all other employees, the designated holiday shall be observed on the day it occurs.

14.8(3) To be eligible for holiday compensation an employee must be in pay status either the last normally scheduled workday before or the first normally scheduled workday after the holiday and shall not have been on unapproved leave without pay the last normally scheduled workday before nor the first normally scheduled workday after the holiday. An employee who terminates and whose last day in pay status precedes a holiday shall not be eligible for payment for that holiday.

14.8(4) When the holiday falls on an overtime-covered employee's scheduled workday, and the employee does not get the day off, the employee shall be compensated for the holiday in accordance with subrule 14.8(1) in addition to a premium rate for time worked. The premium rate shall be paid for hours worked between 12:01 a.m. and 12:00 p.m. on the holiday. However, hours compensated at the premium rate shall not be counted as part of the 40 hours when calculating overtime pay.

When the holiday falls on an overtime-covered employee's day off, the employee shall be compensated for the holiday to a maximum of eight hours.

Compensation for holidays under this subrule shall be either in pay or compensatory leave. The decision to pay or grant compensatory leave shall be made by the appointing authority.

14.8(5) When an overtime exempt employee is required to work on a holiday the employee may be compensated for the time worked in addition to regular holiday pay at the discretion of the appointing authority. Compensation shall be at the employee's regular rate of pay for all hours worked and shall be either in pay or compensatory leave. The decision to pay or grant compensatory leave shall be made by the appointing authority.

When a holiday falls on an overtime exempt employee's day off, the employee shall be compensated for the holiday to a maximum of eight hours.

581—14.9(19A) Military leave.

14.9(1) A probationary or permanent employee who is a member of the national guard, organized reserve, or any component part of the military of the state of Iowa or the United States, shall, when ordered by proper authority to active state or federal military service, be granted leave for the period of active state or federal military service without loss of pay during the first 30 workdays of leave. Military leave may be utilized up to 30 work days in any calendar year. However, any amount of military leave taken during any part of an employee's scheduled workday, regardless of the number of hours taken, shall count as one day toward the 30-workday maximum.

14.9(2) A probationary or permanent employee who is inducted into military service shall be placed on leave status for a maximum period of five years. The employee must notify the agency or institution where employed prior to the military leave of the intent to exercise return from leave rights and must do so within 90 calendar days after honorable discharge from the service or from hospitalization continuing after discharge for a period of not more than one year or the employee will be terminated. Rights upon return from military leave shall be in accordance with the provisions of rule 581—14.6(19A).

581—14.10(19A) Educational leave. Educational leave, with or without pay, may be granted at the discretion of the appointing authority for the purpose of assisting state employees to develop skills that will improve their ability to perform their present job responsibilities or to provide training and developmental opportunities for employees that will enable the agency to better meet staffing needs. Education financial assistance shall be in accordance with rule 581—15.10(19A).

14.10(1) Length of leave. Educational leave shall be requested for a period not to exceed twelve (12) consecutive months. Accrued vacation or compensatory leave need not be exhausted before educational leave is granted. The determination to require the exhaustion of any or all accrued leave shall rest with the appointing authority. The appointing authority may grant an extension of the original leave for an additional twelve (12) months.

14.10(2) Selection of applicants. While the selection of applicants is at the discretion of the appointing authority, it is the express policy of the state to offer all qualified employees an equal opportunity to be considered for educational leave within the limitations imposed by agency staffing requirements.

14.10(3) Educational institutions. An employee on educational leave may take course work at any accredited educational institution within the state. Attendance at out-of-state institutions may be approved provided there are geographical or educational considerations which make attendance at institutions within the state impractical.

14.10(4) Notification. The appointing authority shall notify the legislative council and the director of all educational leaves within 15 days following the granting of the leave in a manner prescribed by the director. If the appointing authority fails to notify the legislative council and the director, the expenditure of funds for the educational leave shall not be allowed.

14.10(5) Agency report. The appointing authority shall report to the director and the legislative council, not later than October 1 of each year, the direct and indirect costs to the agency of educational leave granted to employees during the preceding fiscal year in a manner prescribed by the director.

581—14.11(19A) Election leave. An employee who is not covered by the federal Hatch Act and who becomes a candidate for paid, partisan elective office shall, upon the employee's request, be granted leave thirty (30) calendar days before a contested primary, special, or general election. The employee may choose to use accrued vacation or compensatory leave, or leave without pay to cover these periods.

An employee who is elected to a paid, partisan office or appointed to an elective paid, partisan office shall, upon written request to the appointing authority, be granted leave to serve in that office, except where prohibited by federal law. The use of accrued vacation or compensatory leave, or leave without pay to cover this period shall be at the discretion of the employee. The leave provided for in this rule need not exceed six years. An employee shall not be prohibited from returning to employment before the expiration of the period for which the leave was granted.

581—14.12(19A) Court appearances and jury duty. When in obedience to a subpoena, summons, or direction by proper authority, an employee appears as a witness or a jury member in any public or private litigation in which the employee is not a party to the proceedings, the employee shall be entitled to time off during regularly scheduled work hours with regular compensation, provided the employee gives to the appointing authority any payments received for court appearance or jury service, other than reimbursement for necessary travel or personal expenses. If the employee is directed to appear as a witness by the appointing authority, all time spent shall be considered to be worktime.

14.12(1) Hours spent on court or jury leave by an employee outside the employee's scheduled work hours are not subject to this rule, nor shall any payments received for court appearance or jury service be remitted to the appointing authority.

14.12(2) The employee shall notify the appointing authority immediately upon receipt of a subpoena, summons, or direction by proper authority to appear.

14.12(3) An employee relieved from jury service or appearance as a witness shall report to work if there will be at least two (2) hours remaining in the employee's scheduled workday after necessary return travel time.

14.12(4) Upon return to work, the employee shall present evidence to the appointing authority of any payments received for court appearance or jury service.

581—14.13(19A) Voting leave. An employee who is eligible to vote in a public election in the state of Iowa may request time off from work with regular pay for a period not to exceed three hours for the purpose of voting. Leave shall be granted only to the extent that the employee's work hours do not allow a period of three consecutive hours outside the employee's scheduled work hours during which the voting polls are open.

A request for voting leave must be made to the appointing authority on or before the employee's last scheduled shift prior to election day. The time to be taken off shall be designated by the appointing authority.

581—14.14(19A) Olympic competition leave. An employee shall be granted leave to participate in Olympic competition sanctioned by the United States Olympic Committee.

The employee shall present to the appointing authority proper documentation, a statement of intent to participate and the specific leave periods involved.

Leave shall be granted only for a reasonable time necessary to travel to and from the site of the competition, a reasonable period of pretraining time at the competition site, and the time actually required to participate in the competition. The maximum Olympic leave granted per fiscal year shall not exceed ninety (90) workdays.

Employees shall receive their regular rate of pay during Olympic leave, not to exceed the amount of pay they would receive for a normal scheduled workweek. Overtime is not authorized, nor shall pay be authorized for any days spent in travel, in pretraining or in Olympic competition for which the employee would not ordinarily be compensated if at work.

Employees shall retain their regular employment benefits, including accrual of sick leave, vacation, insurance entitlements, and pay increase eligibility throughout approved Olympic competition leave.

581—14.15(19A) Severe weather leave.

14.15(1) When the employer closes a state facility due to severe weather emergencies, all probationary or permanent employees may elect to use earned compensatory leave, vacation, or leave without pay to cover the absence. Employees may, with the approval of their appointing authority, also elect to work their scheduled hours even though the state facility is closed to the general public. Employees may be permitted to make up lost time within the same workweek with the approval of their immediate supervisor.

14.15(2) If the proper management authority declares that a severe weather situation exists, but the facility is not closed, the following shall apply:

a. If the probationary or permanent employee reports within one-half hour following the scheduled reporting time, the employee will be assumed to have reported on time.

b. If the probationary or permanent employee reports later than one-half hour following the scheduled reporting time, the employee shall be credited with having worked the first one-half hour of the day plus all hours actually worked. Employees may elect to charge any additional lost time to compensatory leave, vacation, or leave without pay.

c. If unable to report to work, the probationary or permanent employee may elect to use earned compensatory leave, vacation, or leave without pay.

581—14.16(19A) Particular contracts governing. Where provisions of collective bargaining agreements differ from the provisions of this chapter, the provisions of the collective bargaining agreements shall prevail for the employees covered by those agreements.

581—14.17(19A) Examination and interviewing leave.

14.17(1) Employees may be granted leave to take examinations for positions covered by merit system provisions. Employees may elect to use vacation leave, compensatory leave, or leave without pay at the discretion of the appointing authority.

14.17(2) Employees may be granted the use of paid work time to attend interviews during scheduled work hours for jobs within their agency. For agencies that have statewide operations, the appointing authority may restrict the use of paid time to interviews within the central office, institution, county, or district office. A reasonable time limit for interviews may be designated by the appointing authority. Employees may be granted leave for interviews outside the agency, central office, institution, county, or district office in which case they may elect to use vacation leave, compensatory leave, or leave without pay at the discretion of the appointing authority.

14.17(3) Employees shall not be granted vacation leave or compensatory leave for taking examinations or attending interviews outside their scheduled work hours.

14.17(4) The use of state vehicles, mileage reimbursement, or per diem shall not be authorized for employees taking examinations or for attending interviews.

14.17(5) Appointing authorities shall post and make known to employees the provisions of this rule.

581—14.18(19A) Service on committees, boards, and commissions. State employees who are appointed to serve on committees, boards, commissions, or similar appointments for Iowa state government shall be entitled to regular compensation for such service. Employees shall be paid in accordance with these rules for time spent.

Pursuant to Iowa Code section 79.1, employees shall not be entitled to additional compensation for such service.

Employees shall have actual and necessary expenses paid.

Employees shall notify the appointing authority at the time of the appointment.

These rules are intended to implement Iowa Code section 19A.9.

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PARENTAL AND FAMILY LEAVE LEGISLATION INTRODUCED - 1989 LEGISLATIVE SESSIONS

JUNE 7, 1989 Update

The following is a summary of parental and family leave bills introduced to date in the 1989 legislative sessions, providing information on leave available for the birth or adoption of a child, or to care for a seriously ill child or family member. In most cases, an employee may use any accrued sick leave, annual leave, or disability leave available to them. Continuation of benefits is also usually provided with the employee paying the cost of those benefits. Most bills also specifically provide for reinstatement to the same or a comparable position at the expiration of the leave. Leave is usually available to either parent in most state programs. Some bills also provide for the temporary transfer of pregnant employees to less hazardous jobs for the duration of their pregnancy. For private sector companies, the proposed legislation usually specifies a number of employees required before leave provisions are in effect.

The status indicated is based on available information from the bill tracking service (State Net) as of June 7, 1989.

CA A 77 Moore (916/445-4246). Makes it an unlawful employment practice for any employer who employs twenty-five or more employees working at the same location to refuse to grant a request by any employee with more than one year of continuous service with the employer and who is eligible for other benefits to take unpaid leave of up to a total of 4 months in an 24-month period for family care. 4/18/89: From Assembly Committee on Labor and Employment.

CA S 257 Torres (916/445-0894). Requires all public and private employers with 15 or more employees to permit an employee to take prescribed unpaid leaves of absence for the birth or adoption of a child and for a child's serious health condition; requires the employee who takes an unpaid leave of absence pursuant to its provisions to be guaranteed his or her existing job or similar position upon returning to work; requires the employer to maintain health insurance for the employee who takes an unpaid leave. 2/1/89: To Senate Committee on Industrial Relations. 4/17/89 To Assembly Committee pm Public Employees, Retirement and Social Security. 4/24/89 In Senate. Read Second Time & Amended. Re-referred to Committee on Appropriations. 6/5/89: To Senate Committee on Appropriations suspense file.

CO S 204 Pascoe (303/866-5000). Makes it discriminatory for an employer to terminate an employee for taking family leave; requires employees to give

written notice of leave. 2/1/89: Introduced. 2/10/89 From Senate Committee on Business Affairs and Labor. Postponed indefinitely.

CT H5847 Taborsak (203/240-0490). Establishes unpaid parental and medical leave options for private sector employees. 1/18/89: To Joint Committee on Family and the Workplace.

CT S 315 Larson (203/240-8600). Allows all employees to take a leave of absence for medical reasons, the birth or adoption of a child or for the care of a child or relative who has a serious health condition. 1/18/89: To the Joint Committee on Family and the Workplace. 4/19/89 Amended on Senate Floor. Passed Senate. To House.

FL S 379 Meek (904/487-5116). Requires an employer, including the state and any of its political subdivisions, that employs 6 or more individuals to grant parental leave to an employee upon the birth of a child or upon the adoption of a child under the age of 6 years by such employee or his spouse. Provides for parental leave of up to 18 consecutive weeks if taken on a full-time basis and up to 36 consecutive weeks if taken on a reduced work schedule. Requires an employer to reinstate an employee who has taken parental leave. 4/4/89: To Senate Committee on Commerce, Judiciary Civil, then to Personnel, Retirement and Collective Bargaining, Appropriations.

FL S 508 Davis (904/488-9910). Prohibits the state from terminating the employment of a career service employee because of the pregnancy of the employee's spouse. Changes certain references to maternity leave for state employees to parental leave. Requires the state to grant career service employees up to 6 months of parental leave without pay and allow such employees to use annual leave credits for parental leave. 4/14/89: From Senate Committee on Personnel, Retirement and Collective Bargaining: Reported favorably to Governmental Operations. 5/24/89: Withdrawn from Senate Committee on Appropriations. Placed on Calendar.

FL S 795 Meek (904/487-5116). Relates to general labor regulations; providing that it is an unlawful labor practice for an employer to take certain action or with respect to the pregnancy, childbirth, and related medical condition of the employee or with respect to the adoption of a minor child; providing certain benefits and leaves of absence; providing remedies. 4/7/89: To Senate Committee on Commerce, then to Committee on Judiciary-Civil, then to Committee on Appropriations.

HI S 763 Menor (808/548-7825). Relates to family leave. 2/2/89: To Senate Committee on Labor and Employment.

HI HR 371 Arakaki (808/548-3154). Establishes a task force on implementing a family leave policy for Hawaii. 4/24/89: From House Committee on Labor and Public Employment, passed as amended. 4/26/89: Passed House.

HI S 1329 Tungpalan (808/548-2261). Relates to family leave. 2/3/89: Introduced. To Senate Committee on Labor and employment, then to Committee on Ways and Means.

HI S 1531 Nakasato (808/548-5933). Relates to family leave. 2/3/89: Introduced to Senate Committee on Labor and Employment.

HI SCR 254 Tungpalan (808/548-2261). Establishes a task force on implementing a family leave policy for Hawaii. 4/18/89: To House Committee on Labor and Public Employment.

HI SR 222 Tungpalan (808/548-2261). Establishes a task force on implementing a family leave policy for Hawaii. 4/14/89: From Senate Committee on Labor and Employment, passed as amended. 4/26/89: Passed Senate.

IA H 121 Peterson (515/281-3371). Relates to parental leaves of absence for employees of the state and provides an effective date. 1/25/89: To House Committee on State Government. 3/13/89 To Senate Committee on State Government.

IA H 192 Sherzan (515/281-3221). Requires parental leave to be available to employees in the state. 2/2/89: Introduced to House Committee on Labor and Industrial Relations.

IN H 1376 Day (317/232-9600). Allows family leave in cases involving the birth, adoption, or serious illness of a child with protection of the employee's employment and benefit rights. 1/16/89: To House Committee on Labor.

IL H 1343 Kulas (217/783-5971). Requires private employer with 50 or more workers to grant up to 8 weeks of unpaid leave to a worker for child birth, child adoption, child illness and related leaves; provides for continuation of health insurance to worker at workers own expense. 4/9/89: To House Committee on Insurance.

KS H 2211 Wagon (913/296-7500). Enacts the family and medical leave act; provides for unpaid leaves of absence from employment for certain employees for births, adoptions and family illnesses. 2/8/89: To House Committee on Labor and Industry.

LA H657 Landrieu (504/342-7393). Relates to employment, to provide for the enactment of the Family Leave Law, for definitions, for family leave, for notice to employers, for spouses employed by the same employer, for employment and benefits protection, for prohibited acts, for enforcement, and for related matters. 5/1/89: Introduced. To House Committee on Labor and Industrial Relations.

MD S 273 Wynn (301/858-3127). Requires employers to provide unpaid parental leave to employees who are natural or adoptive parents; establishing requirements for the request, the grant and the duration of parental leave; specifying that employees returning from parental leave are entitled to employment in their former or comparable position; requiring employee benefits or seniority under specified circumstances. 3/20/89: From Senate Committee on Finance: Reported unfavorably.

MD H 1510 Pitkin (801/858-3098). Requires employers to allow unpaid family leave to employees who have been employed at least 12 months and are natural, adoptive, or foster parents of a child or dependent adult; specifies requirements to request family leave; permits an employer to adopt reasonable policies regarding the timing of such requests; sets policies for re-employment, rights at times of layoff, health care coverage, accrual of

benefits and seniority. 3/16/89: From House Committee on Economic Matters: Reported Unfavorably.

MA H 2580 O'Brien (617/722-2356). Relates to parental leave. 1/31/89: To Joint Committee on Commerce and Labor.

MA H 3333 Gibson (617/722-2356). Relates to parental leave. 1/13/89: To Join Committee on Commerce and Labor.

MA H 3347 Travinski (617/722-2356). Relates to maternity leave law. 2/7/89: Introduced. To Joint Committee on Commerce and Labor.

MA H 3703 Magnani (617/722-2356). Changes maternity leave to parenting leave. 2/7/89: Introduced. To Joint Committee on Commerce and Labor.

MA H 5590 Gibson (617/722-2356). Further regulates maternity leave for mothers adopting children under three years of age. 5/5/89: Introduced. To Joint Committee on Judiciary.

MN H 367 McLaughlin (612/296-7152). Requires employers to grant employees family leave of up to 2 weeks per year for school conferences or visits to or care for a child, spouse, or parent after one year of employment. 4/17/89: From House Committee on Labor-Management Relations with recommendation to pass as amended.

MO H 385 Shear (314/751-4163). Makes it unlawful for an employer to refuse to grant an employee's request for 12 weeks of parental leave of absence for the birth of an infant or the adoption of a child under six. 3/22/89: From House Committee on Labor with recommendation to pass as amended.

MO S 206 Nixon (314/751-3327). Makes it an unlawful employment practice to refuse to allow a female employee to take pregnancy leave. 1/18/89: To Senate Committee on Commerce and Consumer Protection. 3/15/89: Failed to Pass Senate.

MS H 1257 Clarke (601) 359-3770). Requires employers in this state who employ 50 full time employees or more to permit their employees to take family leave and medical leave; defines these terms and prescribes conditions; prohibits certain acts by employers that restrain employees from exercising their rights to such leave; provides for civil remedies for the enforcement of this act. 1/16/89: To House Committee on Appropriations.

NY A 3802 Nadler (518/455-5802). Provides that public and private employers shall grant a leave of absence to any pregnant employee or spouse thereof during the seventh month of pregnancy and ending one year after childbirth; provides for reinstatement to a position without diminution in salary and accrual of seniority during leave; also allows such right to every parent adopting a child one year old or younger. 2/16/89: Introduced. To Assembly Committee on Labor.

NC H 1076 Kennedy (919/733-7760). Allows employees to take parental leave in cases involving birth or adoption rights of a child, and to protect the employee's employment and benefit rights; allows 18 weeks to be taken every 24 months of unpaid leave. 4/7/89: Introduced. To House Committee on Public Employees.

ND S 2310 Mathern (701)224-3506). Provides uncompensated family leave to certain employees, protects employment and benefit rights and allows employees to use certain other leave provided by employers to care for a child, spouse, or parent with a serious health condition. 4/12/89: Signed by Governor.

NV A 32 Williams W. (702/885-5739). Requires certain employers to grant leave with pay to employees to meet with children's teachers, counselors or administrators. 1/17/89: To Assembly Committee on Labor and Management. 2/22/89: To Senate Committee on Commerce and Labor.

NV S 429 Horn (702/885-5742). Revises provisions concerning leave for pregnant employees. 6/2/89 From Assembly Committee on Labor and Management.

NY A 414 Daniels (518/455-4521). Provides for a leave of absence from employment upon adoption of a hard-to-place or handicapped child in certain cases. 1/30/89: Amended and returned to Assembly Committee on Labor. 3/14/89: Referred to Assembly Committee on Ways & Means.

NY A 2136 Hillman (518/455-5172). Provides that any public employee who takes a leave of absence due to the pregnancy shall not lose any retirement credit obtainable during such period upon payment. 1/26/89: To Assembly Committee on Governmental Employees.

NY S 790 Goodhue (518/455-3111). Provides for a leave of absence from employment upon adoption of a hard-to-place or handicapped child in certain cases. 4/18/89: From Senate Committee on Labor.

NY S 844 Stavisky (518/455-3461). Provides that any public employee who takes a leave of absence due to the pregnancy shall not lose any retirement credit obtainable during such period. 1/17/89: To Senate Committee on Civil Service and Pensions.

NY S 2077 Lack (518/455-2071). Provides that an employee shall be entitled to a total of 18 work weeks of unpaid family leave during any 24 month period and to temporary medical leave as necessary not to exceed 26 work weeks during any 12 month period; makes numerous related provisions. 2/8/89: Introduced to Senate Committee on Labor.

NY A 4178 Gottfried (518/455-4941). Provides that an employee shall be entitled to a total of 18 work weeks of unpaid family leave during any 24 month period and to temporary medical leave as necessary not to exceed 26 work weeks during any 12 month period; makes numerous related provisions. 5/24/89: From Assembly Committee on Codes. Referred to Assembly Committee on Ways and Means.

OH H 143 Hagan (614/466-8026). Permits parental leave for employees in connection with the birth or adoption of a child. 1/31/89: To House Committee on Health and Retirement.

OK S 15 Pierce (405/524-0126). Requires the Office of Personnel Management to promulgate rules regarding parental leave for childbirth, adoption or care of a critically ill child; requires promulgation of rules regarding annual, sick and compensatory leave accumulations upon separation, intragency transfer and reinstatement; requires state employees to have

completed a minimum of two years of cumulative full-time equivalent service to be eligible for longevity pay; changes composition of exempt unclassified service. 1/4/89: To Senate Committee on Appropriations.

OK H 1371 Lewis (405/521-3851). Changes certain criteria for longevity pay for state employees; authorizes the Administrator of the Office of Personnel Management to promulgate rules concerning certain types of leave, including annual leave, sick leave, interagency transfer and parental leave. 4/26/89: Passed Senate. To House for concurrence.

OR H 2249 Office of Judiciary (503/378-5962). Revises language relating to employer's authority to grant parental leave. 1/10/89: To House Committee on Labor. 5/11/89: To Senate Committee on Labor.

OR H 2504 Kotulski (503/378-8832). Declares refusal by certain employers to grant leave to care for chronically ill child, spouse or parent to be unlawful employment practices; establishes procedures for notice to employer, use of accrued leave and reinstatement of employees after such leave. 1/31/89: To House Committee on Labor.

OR S 518 Hill L. (503/378-8315). Requires employers to allow pregnant female employees, so requesting, to transfer to less strenuous or hazardous position for the duration of the pregnancy or take a leave of absence with return to former or equivalent job. 4/20/89: To House Committee on Labor.

PA H 96 Burns (717/787-2372). Defines "approved leave of absence" and "maternity leave of absence". 2/6/89: Referred to House Committee on Appropriations.

PA H 1551 Weston (717/787-2372). Provides for maternity leave. 5/24/89: Introduced, To House Committee on Labor Relations.

PA H 1552 Weston (717/787-2372). Provides for parental leave for employees in cases of birth or adoption. 5/24/89: Introduced. To House Committee on Labor Relations.

RI H 5321 Benoit (401/277-2466). Relates to the state retirement system includes parental leave provisions. 1/19/89: To Joint Committee on Retirement.

SC H 3086 Rudnick (803/734-2961). Relates to employment security and regular benefits, by adding section 41-35-15 so as to preclude the denial or abridgement of benefits under title 41 to an individual absent from employment for purposes of maternity leave after exhaustion of paid leave in connection with the absence due to maternity. 1/10/89: To Committee on Labor, Commerce and Industry.

SC H 3656 Hearn (803/734-3013) Allows adoptive parents employed by the state or any of its political subdivisions to use accrued leave for the purposes of arranging for the adopted child's placement or caring for the child after placement. 4/20/89: From House Committee on Ways and Means: Reported with amendments.

SD H 1394 Vanderlinde (605/773-3842). Provides for parental leave for certain employees. 2/22/89: Did not pass House.

TN S 965 Haynes (615/741-6679). Authorizes parental leave for adoptive parents. 2/1/89: Introduced. 2/6/89: To Senate Committee on Commerce, Labor, & Agriculture. 5/2/89: From Senate Committee on Commerce, Labor and Agriculture; reported unfavorably.

TN H 1333 Williams (615/741-4159). Authorizes parental leave for adoptive parents. 4/5/89: From House Committee on Labor and Consumer Affairs: Reported favorably.

TX H 89 Hinojosa (512/463-0578). Pertains to the unpaid parental leave of state employees, including employment protection and benefits. 1/17/89: To House Committee on State Affairs.

TX H 2176 Hudson S. (512-463-0586). Relates to a mandatory maternity leave program for certain private employees. 3/22/89: To House Committee on Labor and Employment Relations.

TX S 1594 Parmer (512/463-0112). Relates to the right of unpaid maternity and parental leave for employees of the State of Texas and provides for enforcement. 4/25/89: To House. 5/15/89: From House Committee on State Affairs: reported favorably.

VT H 136 Almy (802/828-2247). Permits employees temporary employment leave for the birth or adoption of a child, to care for sick family members and when the employee is seriously ill. 1/20/89: To House Committee on Health and Welfare. 4/12/89: To Senate Committee on General Affairs.

VT S 19 Illuzzi (802/828-2241). Sets minimum parental leave employment standards. 1/12/89: To Senate Committee on General Affairs.

WA H 1581 Wang (206/786-7974). Provides for family and medical leave. Provides for family leave upon the birth or adoption of a child or to care for a family member with a serious health condition, and provides for temporary medical leave for an employee with a serious health condition. 1/30/89: To House Committee on Commerce and Labor. 4/26/89: To Senate. 6/1/89: Signed by Governor.

WA H 2073 Wang (206/786-7974). Provides family leave for adoptive parents. Requires certain employers who grant leave to their employees for the purpose of caring for a newborn child to make the same leave available upon the same terms for adoptive parents, foster parents, stepparents, and legal guardians, both men and women. 5/3/89: Introduced. To House Committee on Commerce and Labor.

WA S 5598 Kreidler (206/786-7642). Provides limited duty work or leave for pregnant firefighters and law enforcement officers. Provides for alternatives in making limited duty assignments. 1/30/89: To Committee on Governmental Operations.

WA S 5932 Williams (206/753-5000). Provides for family and medical leave; defines terms; provides that employees are entitled to sixteen work weeks of leave during a two year period under specified circumstances; requires reasonable notification by an employee taking leave; establishes hearing procedures for dispute regarding the leave policy; prescribes penalties for unfair practices. 2/16/89: Introduced. To Senate Committee on Economic Development and Labor.

WA S 5966 Rinehart (206/786-7690). Provides the same family leave for adoptive parents as for birth parents; requires certain employers who grant leave to their employees for the purpose of caring for a newborn child to make the same leave available upon the same terms for adoptive parents, foster parents, stepparents, and legal guardians, both men and women. 4/21/89: To Senate for concurrence. Senate refused to concur in House amendments. 4/24/89: Returned to Senate.

WA S 6016 Lee (206/786-7664). Provides family leave for parents who must care for children; authorizes ten work weeks of family leave during any 24 month period, designates family situations for which the leave may be approved, requires the employee to give notice of intent to take leave and authorizes the employer to require confirmation of need by a health care provider, establishes the rights of the employee upon return to employment, and authorizes an employee to file a complaint alleging a failure to comply with the act. 4/18/89: From Senate Committee on Economic Development and Labor.

WV S 251 Pritt (304/340-3200). Relates to parental leave generally; prohibited acts and criminal penalties. 4/7/89: Passed House. 4/24/89: Signed by Governor.

Source: State Net
A Service of Information for Public Affairs
Sacramento, CA 95814

Washington Scoreboard

Topic	Priority	Status	Comments
Mandated Parental Leave H.R. 770, S. 345	1	ASPA testified at Senate hearing on S. 345 held Feb. 2 and at House hearing on H.R. 770 held Feb. 7. House bill passed by Committee Mar. 8. Senate bill passed by Committee April 19. Vote by full House possible in June or July.	H.R. 770 requires 10 weeks of job-guaranteed leave over two years for birth, adoption, or serious illness of a child or parent, and 15 weeks employee disability leave over one year. One year's employment required for eligibility and all employees working 20 hours/week covered. Health benefits must be continued during leave time. S. 345 similar, but with only 13 weeks disability exemption leave.
Section 89 H.R. 634, S. 350; H.R. 518; S. 89 H.R. 1864, S. 654	1	Bill sponsors actively working to gain co-sponsors from other Senators and Representatives; grass roots opposition to Section 89 building. ASPA testified on repeal before the House Small Business Committee on March 21 and before the House Ways and Means Committee on May 3. H.R. 1864 will be voted on by Ways and Means by late June. Senate Finance Committee has held hearings on Sec. 89 reform, and Chairman Bentsen will introduce reform bill shortly.	S.350 and H.R. 634 would repeal Section 89 of 1986 Tax Reform Act; S. 89 and H.R. 518, would delay the effective date of Section 89 for one year. S.654 would amend Section 89 to include a safe harbor eligibility test for simple health plans. H.R. 1864, introduced by Chairman of House Ways and Means Committee, Dan Rostenkowski (D-Ill.) would replace Section 89 with eligibility test and tax cap on excludable benefits for health plans only, and is considered the most likely reform vehicle. Strong grassroots action necessary to convince Congress to make change.
Employee Educational Assistance S. 260 H.R. 2037	1	S. 260 has 24 cosponsors; H.R. 2037 has 149 cosponsors.	S. 260 and H.R. 2037 would extend and make permanent Section 127 of Internal Revenue Code, which allows employees to receive employer-paid educational benefits tax free. Bills would also reinstate exclusion for graduate level courses.
Child Care H.R. 30, H.R. 3, S. 5	2	Hearings held in House Education and Labor Committee on H.R. 30 and H.R. 3. S.5 passed by Senate Labor Committee on March 15 and ready for vote by full Senate. ASPA testified at hearings before Senate Finance Committee on April 19.	S. 5, introduced by Sen. Christopher Dodd, D-Conn., and cosponsored by Sen. Orrin Hatch, R-Utah, is modified version of "ABC" bill (Act for Better Child Care Services) introduced in last Congress. Would provide over \$2 billion in federal monies to increase availability of child care services. Bill still largely targets money to institutional care, and establishes federal standards, but now provides tax credits to encourage employer programs, provisions to reduce liability risks, a presidential awards program for progressive employers, and programs linking elderly and children's service. H.R. 30 more closely resembles original ABC bill; H.R. 3 resembles original ABC bill with expansion to Head Start program.
Minimum Wage H.R. 2, S. 4	2	Passed by House on March 23. Passed by Senate on April 12. House-Senate conference agreement approved by House May 11 and Senate May 17. Bill will be sent to President Bush who is expected to veto the measure. If veto is sustained, further action is uncertain.	Agreed to by House and Senate, the legislation would increase the minimum wage to \$3.85/hr by Oct. 1, 1989, \$4.25/hr by Oct. 1, 1990, and \$4.55/hr by Oct. 1, 1991. Legislation allows a two-month training wage. Bush administration has indicated willingness to accept an in-

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July 12, 1989

M E M O R A N D U M

TO: MEMBERS OF THE SERVICE COMMITTEE OF THE LEGISLATIVE COUNSEL

FROM: Leslie E. Workman, Legal Counsel

RE: LEGISLATION, REGULATIONS, AND CONTRACTS RELATING TO PREGNANCY, MATERNITY, AND FAMILY LEAVE

Enclosed is some new information on the pregnancy, maternity, and family leave issues. The Public Employment Relations Board sent a copy of the sick leave policies which correspond with the three collective bargaining agreements which were included in the packet of information that you received at the last meeting, and that made reference to use of sick leave for purposes of child birth and/or pregnancy. The P.E.R.B. board also sent us two other collective bargaining agreements which are in with your new information: the S.P.O.C. agreement and the I.U.P. agreement. The administrative code provisions on leave, and the applicable definitional sections, for employees subject to the Department of Personnel are included in this information, as well as a chart of the state code provisions, which were alluded to in the information distributed at the last meeting. A listing of other states' proposed legislation and a copy of a clipping noting current pending federal legislation are also included. We hope to obtain a copy of the federal bills before the July 19th meeting.

Chairman Connors obtained a copy of the Family Care provisions of the C.W.A. and the I.B.E.W. contract with A.T. & T. Those provisions permit employees to take up to one year of unpaid leave for childbirth, adoption of a minor child, or to care for a seriously ill family member.

An employee taking such a leave of absence is entitled to reinstatement in his/her same job or in an equivalent position upon return to work, the company continues to pay life insurance and death benefits during the duration of the leave, and the company pays for up to six months of health and dental insurance while the employee is on leave. The employee is responsible for the balance of any insurance and is not entitled to disability benefits until he/she returns to work. Employees are eligible to receive up to \$2,000 from the company, to cover expenses incurred in the adoption of a minor child, in addition to any other benefits received or leave taken.

If there are any questions, or if I may be of further assistance, please contact me at (515) 281-3798. Thank you for your time and consideration.

390b/lw/encl.

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July 13, 1989

MEMORANDUM

TO: MEMBERS OF THE SERVICE COMMITTEE OF THE LEGISLATIVE COUNCIL
FROM: John Fatino, Research Analyst
RE: Remaining Funds from Midwestern Legislative Conference

At the request of Representative John Connors, the Council of State Governments Midwestern Office was contacted regarding use of the remaining funds from the Midwestern Legislative Conference hosted by Iowa in 1987. Ms. Virginia Thrall, Regional Director of the Midwestern Office of the Council of State Governments, reported that most states have not remitted funds to the Council of State Governments. Most states in the Midwestern Region have used all funds to cover remaining expenses. Only one state (Missouri) has recently remitted funds.

In light of that situation, Representative Connors is currently investigating using the remaining funds to solicit a bid for Iowa to host the National Conference of the Council of State Governments in 1992. The National Conference will not return to the Midwestern Region until that time.

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jf/dg/20

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July 18, 1989

MEMORANDUM

TO: MEMBERS OF THE SERVICE COMMITTEE

FROM: Diane Bolender, Acting Director, and Richard Johnson,
Legal Division Chief

RE: Establishment of Legal Research Request Policy

On June 21, 1989, the Legislative Service Bureau requested Legislative Council guidance regarding the establishment of a legal research request policy for the Bureau. Pursuant to the request, the Legislative Council referred the issue to the Service Committee for deliberation. The following memorandum sets out relevant considerations for the Service Committee.

LSB'S STATUTORY AUTHORITY. Pursuant to Code section 2.58 the Legislative Service Bureau receives requests from legislators to perform legal research and to prepare reports pertaining to that research. The Code section, however, prohibits such reports and the findings in such reports from containing recommendations.

RECENT LEGAL RESEARCH REQUESTS. Recently, legal research requests have been made which ask Bureau attorneys to make conclusions regarding the legality of certain factual situations as related to Iowa law. Such a request brings into question the propriety of the Bureau making such a conclusion in light of the statutory prohibition against the making of recommendations. While it is definitely the Bureau's statutory responsibility to perform legal research and present the research findings to the legislator requesting the research, the Bureau must do so in a manner

July 18, 1989

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which will not place the Bureau in the position of making policy recommendations. This scenario thus raises the question of the proper Bureau response to a legislator's request for a legal conclusion regarding a specific set of facts. For example, what should the proper response be to a legislator's request of a Bureau attorney to formally advise the legislator if an action of a government official violates Iowa law?

FACTORS INFLUENCING THE ESTABLISHMENT OF A LEGAL RESEARCH REQUEST POLICY.

Any policy established must meet both the needs of legislators to have the Bureau perform legal research and the needs of the Bureau in offering legal research findings only in conformity with the statutory restrictions regarding recommendations. The statutory prohibition on recommendations is indeed an important one in that it greatly assists the Bureau in performing its role of providing nonpartisan drafting and staffing assistance to the General Assembly.

ATTORNEY GENERAL OPINIONS. While the Bureau is statutorily prohibited from making legal conclusions containing recommendations, conclusions as to the legality of any particular behavior or set of circumstances are commonly made by the Attorney General under Code section 13.2, subsection 4, which requires the Attorney General to give an opinion in writing, when requested, upon all questions of law submitted by the General Assembly or by either house thereof, or by any state officer, elective or appointive. Questions submitted by state officers must be of a public nature and relate to the duties of such officer.

DEVELOPMENT OF POLICY. While the Bureau would certainly welcome more input before a policy is established, the Bureau would put forward the following policy statement for discussion purposes only:

Policy for Requesting Legal Research
from the Legislative Service Bureau
(For Discussion Purposes Only)

The Legislative Service Bureau may accept from legislators all legal research requests which request information regarding the law relating to a particular subject matter, provided that the request does not ask that the Bureau apply the law to a particular fact pattern. This policy is intended to allow the Bureau to investigate the area of law and to make general findings in regard to particular subject matters but to prevent the Bureau from making conclusions as to the legality of any particular behavior or set of circumstances. Legal research findings shall be reviewed internally by a Bureau attorney licensed to practice law in Iowa.

Legresearch
rj/dg/20

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July 19, 1989

MEMORANDUM

To: CHAIRMAN CONNORS AND MEMBERS OF THE SERVICE COMMITTEE

From: Diane Bolender

RE: Personnel Report

I am requesting approval to use two employees of the Legislative Service Bureau to assist the drafters by taking minutes for some of the interim study committees. To date, the Service Bureau will be responsible for administering approximately 23 interim committees, 3 statutory committees, and the Legislative Council and five of its committees. Each staff member will be assigned as either a primary or secondary staff person for from five to six committees (except for Gary Kaufman and Janet Wilson). There will be two new staff members and these individuals can be responsible for the minutes for the committees to which they are assigned. I propose that Bridget McNerney who has been employed by the Legislative Service Bureau for the last two sessions as a bill clerk and Peggy Glick, who is employed to assist the Higher Education Task Force, be responsible for minutes for approximately three interim committees each. Peggy's assistance would depend upon her workload for the Higher Education Task Force, and the Service Bureau budget would pay for her salary after the Task Force work is completed. It is proposed that Bridget McNerney (who as a bill clerk is assigned to grade 13, step 2) be employed for the remainder of the interim as a temporary proofreader/indexer (at grade 17, step 1) to perform the minute taking duties. Grade 17 is the grade assigned to committee secretaries. At the commencement of the legislative session, Ms. McNerney would revert to bill clerk status.

July 19, 1989

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Mr. C. J. May has resigned as Legal Counsel effective July 20, 1989, to accept a position in a law firm in Dubuque. I have commenced the employment process for a replacement for C. J. and have been receiving applications.

The process for filling the positions of librarian, public information office assistant, and Administrative Code Editorial Assistant has commenced. Approval for filling these positions was granted at the June Legislative Council meeting.

The process for filling the positions of Administrative Assistant and Publications Coordinator in the Administrative Code Division has commenced. These are vacant positions in the Administrative Code Division that need to be filled.

Enclosed are copies of a listing of merit increases granted, and persons hired, since the June 21, 1989, Service Committee meeting and a listing of overtime worked during the 1989 legislative session.

Personnel719

db/dg/20

MERIT INCREASES GRANTED SINCE THE LAST PERSONNEL REPORT

The following employees received merit increases since the last Personnel Report to the Service Committee, dated June 21, 1989.

Legal and Research Divisions. Diane Bolender, Richard Johnson, Mike Goedert, Janet Wilson, Gary Kaufman, and Doug Adkisson.

Iowa Code Division. JoAnn Brown, Loanne Dodge, Richard Schulze, and Sarah Cartwright.

Administrative Code Division. Phyllis Barry, Grace Rehnblom, Kathy Bates, Pam Worden, Toni Boyd, and Pat Fetters.

Information Services Division . Kathy Farrell.

Support Services Division. Marge Knudsen, Kitty Miklus, Sarah Craig, Merilee Johnson, Andrea Meier, and Cathy Young.

REPORT ON PERSONS HIRED SINCE THE LAST PERSONNEL REPORT

Temporary Code Proofreader

Alice Gossett	15-1
Donna Munzenmaier	15-1

07/13/89
116e

.@ Professional Staff Overtime -- For Pay Period 04/28/89 - 05/11/89 G001054

Name	. Prior O-T	. O-T Worked	. Tot O-T Worked	.Max C-T Allowed	. Prior C-T Use	. C-T Used	. Tot C-T Used	. C-T Avail
Peeters	241.25	43.75	285.00	120.00	0.00	0.00	0.00	120.00
Bolender	296.50	46.00	342.50	120.00	0.00	0.00	0.00	120.00
Adkisson	535.50	64.00	599.50	120.00	0.00	0.00	0.00	120.00
Brown	60.00	2.00	62.00	22.00	0.00	0.00	0.00	22.00
Funaro	332.75	34.00	366.75	120.00	0.00	0.00	0.00	120.00
Goedert	205.50	48.75	254.25	120.00	0.00	0.00	0.00	120.00
Johnson, M.	201.00	42.75	243.75	120.00	0.00	0.00	0.00	120.00
Johnson, R.	247.50	45.50	293.00	120.00	0.00	0.00	0.00	120.00
Johnson, T.	199.50	42.00	241.50	120.00	0.00	0.00	0.00	120.00
Kaufman	190.25	33.75	224.00	120.00	0.00	0.00	0.00	120.00
May	197.50	31.00	228.50	120.00	0.00	0.00	0.00	120.00
Nail	150.50	29.50	180.00	120.00	5.00	5.00	5.00	115.00
Pollak	284.25	27.50	311.75	120.00	0.00	0.00	0.00	120.00
Voss	140.00	37.25	177.25	120.00	0.00	0.00	0.00	120.00
Wilson	238.00	36.75	274.75	120.00	0.00	0.00	0.00	120.00
Vinegarden	291.50	49.75	341.25	120.00	0.00	0.00	0.00	120.00
Workman	303.00	47.00	350.00	120.00	0.00	0.00	0.00	120.00

.GRAND-TOTAL -

. O-T Worked =	661.25
. Tot O-T Worked =	4775.75
. Max C-T Allowed =	1942.00
. C-T Used =	0.00*
. Tot C-T Used =	5.00
. C-T Avail =	1937.00

Support Staff Overtime -- For Pay Period 04/28/89 - 05/11/89 F001052

NAME	O-T	WORKED	TOT O-T	TOT C-T	PRIOR C-T USE	C-T USED	TOT C-T USED	C-T AVAIL
Clason	0.00		0.00	0.00	0.00		0.00	0.00
Colonno	154.75	48.50	203.25	304.88	5.00	1.00	6.00	298.88
Craig	181.50	46.50	228.00	342.00	1.00		1.00	341.00
Cross	153.50		153.50	230.25	120.00	60.00	180.00	50.25
Fisher	198.00	45.25	243.25	364.88	4.00		4.00	360.88
Greenwood	178.25	41.50	219.75	329.63	0.00		0.00	329.63
Jennings	69.00	37.25	106.25	159.38	0.00		0.00	159.38
Johnson	121.75	40.00	161.75	242.63	1.00		1.00	241.63
Knudsen	11.75		11.75	17.63	4.00	.25	4.25	13.38
McGhee	0.00		0.00	0.00	0.00		0.00	0.00
Meier	195.00	49.50	244.50	366.75	4.00		4.00	362.75
Miklus	150.75	45.50	196.25	294.38	87.50	12.50	100.00	194.38
Weddell	87.00	13.00	100.00	150.00	0.00	1.75	1.75	148.25
Wyer	237.00	45.50	282.50	423.75	4.00		4.00	419.75
Young	187.25	55.00	242.25	363.38	0.00		0.00	363.38
Fridlington	165.25	33.50	198.75	298.13	8.00	8.50	16.50	281.63
Peterson	58.50		58.50	87.75	87.75		87.75	0.00

.GRAND-TOTAL -

O-T WORKED	=	501.00*
TOT O-T WORKED	=	2650.25
TOT C-T ALLOWED	=	3975.42
C-T USED	=	84.00*
TOT C-T USED	=	410.25
C-T AVAIL	=	3565.17

LFB PERSONNEL REPORT

July 19, 1989

Personnel actions since last report:

Merit Increases

Le Ann Dunne-Jaber	06/28/89
Doug Wulf	06/16/89
Holly Lyons	06/16/89
Paul Durand	07/07/89
John Hawley	07/07/89
Beth Lenstra	07/07/89
Carter Ricks	07/07/89
Sherry Stratman	07/07/89
Terry Johnson	07/07/89
Bob Snyder	07/07/89
Tim Faller	07/07/89

Vacanted Positions

Dan Ritter	07/06/89
Leg Analyst II	03/21/89
Run Designer II	05/11/89

Filled Positions

None

798b:tcf:7-18-89

.DATE 15 MAY 89 23:16:54 RID 1040G 15 MAY 89 HML
 Comptime report for Fiscal Year 1989 reflects time accrued from
 June 10, 1988 thru May 11, 1989 .

Name	Comptime Accrued	Time Lost (first 40)	Total > 40 Hours	Total Time
Johnson	571.70	40.00	531.70	120.00
Faller	472.50	40.00	432.50	120.00
Lyons	465.50	40.00	425.50	120.00
Lenstra	435.50	40.00	395.50	120.00
Dickinson	349.75	40.00	309.75	120.00
Prouty	325.50	40.00	285.50	120.00
Ferguson	319.75	40.00	279.75	120.00
Neiderbach	267.00	40.00	227.00	120.00
Wulf	244.25	40.00	204.25	120.00
Ritter	242.00	40.00	202.00	120.00
Robinson	239.00	40.00	199.00	120.00
Stratman	201.00	40.00	161.00	120.00
Wiggins	200.75	40.00	160.75	120.00
Ricks	194.50	40.00	154.50	120.00
Wisner	192.25	40.00	152.25	120.00
Durand	188.00	40.00	148.00	120.00
Snyder	183.75	40.00	143.75	120.00
Mahmood	181.00	40.00	141.00	120.00
Hawley	160.00	40.00	120.00	120.00
Lerdal	136.75	40.00	96.75	96.75
Knapp	91.25	40.00	51.25	51.25
Livingston	58.50			87.75
Sevedge	52.50			78.75
Holmes	5.00	5.00		
Wikner	3.50			
Dunne-Jaber				

MEMORANDUM

The Office of Citizens' Aide is established and operates under the authority of chapter 601G. The office is under the direction and supervision of the Citizens' Aide, who holds the position for four year incremental periods, subject to the appointment and removal power of the Legislative Council and the General Assembly and removal under chapter 66. See, sections 601G.3 and 601G.5; also chapter 66. Also, although the Legislative Council has the authority to "hear and act upon appeals of aggrieved employees of...the office of the citizens' aide pursuant to rules of procedure established by the council" the Citizens' Aide has broad rule-making authority, not subject to chapter 17A, which appears not only to permit regulation of the handling of complaints and investigations conducted by the Office, but also to set policies and procedures relating to personnel. See, sections 2.42, 601G.3, and 601G.9, subsection 2; also Senate File 141, sec. 78 (73rd G.A., 1st Sess.).

The Citizens' Aide must be a citizen of the United States, and a resident of the State of Iowa, and must be qualified to analyze problems of law administration and public policy, although the Citizens' Aide is not required to be a lawyer. See, section 601G.4; also, Op. Atty. Gen. Sept. 27, 1973. Neither the Citizens' Aide nor any member of the Citizens' Aide staff is permitted to hold another public office of trust or profit, except for the office of notary public; be gainfully employed by an agency which is the subject of an investigation under chapter 601G, which could create a conflict of interest or interfere with the performance of the duties associated with the Office of Citizens' Aide; or take an active part in partisan affairs. See section 601G.7. The Citizens' Aide may not assist individuals in bringing certain legal action. See, Op. Atty. Gen., Sept. 27, 1973, and Op. Atty. Gen., July 11, 1980.

The Office of Citizens' Aide is an investigative and reporting agency which is granted the authority to investigate any administrative action of any agency, whether the action is final action or not, except for administrative action regarding an employee's employment relationship with the agency in question. See section 601G.9, subsection 1. The investigatory power does not extend to private agencies. See, Op. Atty. Gen., Nov. 20, 1973. The investigation may be conducted upon receipt of a complaint, which may be received from any source, or upon the Citizens' Aide's own motion. See, section 601G.9, subsection 1, and section 601G.12, unnumbered paragraph 1. The Citizens' Aide must investigate a complaint, unless the Citizens' Aide finds that a complainant has another reasonably available remedy or channel of complaint; the complaint is beyond the scope of the Citizens' Aide's authority; the complainant has no interest which is affected by the administrative action complained of; the complaint is trivial, frivolous, vexatious, or made in bad faith; the Citizens' Aide has other more worthy complaints; the Citizens' aide has insufficient resources to conduct an adequate investigation; or the complaint has been delayed too long to justify immediate attention. See

section 601G.12. Under the rules promulgated by the Citizens' Aide, the Citizens' Aide may also decline to investigate a complaint if there is insufficient evidence to initiate an investigation or a previous determination has been made by the Citizens' Aide on the matter. See I.A.C. 210-2.1(1)(h) and (i). Administrative action that may be investigated is action or a failure to act that might be contrary to law or regulation; unreasonable, unfair, oppressive, or inconsistent with the general course of an agency's functioning, even though the action is lawful; based on a mistake of law or an arbitrary finding of fact; based on an improper motivation or irrelevant consideration; or unaccompanied by an adequate statement of reasons. See section 601G.11, subsections 1 through 5. The Citizens' Aide may also investigate procedures that require strengthening to "lessen the risk that objectionable administrative actions will occur." See section 601G.11. It should be noted that, although the subjects for investigation by the Citizens' Aide are not discretionary, the use of the word "might" in section 601G.11 would appear to couch the terms of the statute as guidelines for action, rather than as a mandate upon the office. The Citizens' Aide does appear to have the authority to delay investigation, irrespective of the grounds contained in the complaint under section 601G.12, although the duty to investigate does appear to be mandatory under that same section.

The Citizens' Aide has, in addition to the power of investigation, the power to prescribe the methods by which complaints are to be made, received, and acted upon; the power to determine the scope and manner of investigations to be made; and the power to determine the form, frequency, and distribution of conclusions and recommendations of the office. See section 601G.9, subsection 2. The Citizens' Aide probably also has the authority to prescribe time limits for investigation, issuance of reports, and other aspects related to their investigatory function, since very few time limits are set out in chapter 601G. Except for the restriction contained in chapter 601G, the authority of the Legislature to remove the Citizens' Aide, and the Legislative Council's ability to hire the Citizens' Aide and act on appeals of aggrieved employees of the Office, there is no statutory provision for review or approval of actions taken by the Citizens' Aide, unless the action is "actuated by malice or is grossly negligent". See sections 601G.9 and 601G.19; also S.F. 141, sec. 78. Since the rule-making authority of the Office was excepted from chapter 17A under Senate File 141, any rules promulgated by the Citizens' Aide are not subject to the authority of the Administrative Rules Review Committee or gubernatorial veto, although they would be subject to legislative veto under Article III, section 40, and are subject to public scrutiny under the rules promulgated by the Citizens' Aide. See, I.A.C. 210-4.1, 4.2. However, if a person alleges that the person has been discriminated against by the Citizens's Aide's Office, the Iowa Civil Rights Commission has jurisdiction to investigate and determine complaints, because "(i)mplicit in every complaint of "discrimination" is an allegation of an intentional violation of the Iowa Civil Rights Act." See, Op. Atty. Gen. July 13, 1982. Neither chapter 601G nor the rules promulgated by the Citizens' Aide contain a mechanism for complaints relating to conduct of staff members in dealing with the public. It is possible, however, that an action for defamation of character may be made against the Office of Citizens' Aide, if the findings of the Citizens' Aide are untrue, since the immunity extended to the Citizens' Aide is qualified and malice is an element of a defamation/libel claim. See, Anderson v. Low Rent Housing Com'n, Etc., 304 N. W. 2d 239, 245-247; also chapter 659, Code.

In addition to the above mentioned powers, the Citizens' Aide has the authority to inspect any and all documents held by an agency, unless disclosure of the documents would violate federal law or cause the agency to lose federal funding. See section 601G.9, subsection 3. The Citizens' Aide may examine confidential documents, notwithstanding section 22.7, and the office is subject to the same disclosure requirements and penalties as the original custodian. See, section 601G.9. This may conflict with the reporting duty imposed upon the office under section 601G.8, since the General Assembly and the Governor are not always on the permissible list of recipients of information under some statutes. See, e.g. section 235A.15. The Citizens' Aide may enter and inspect premises of an agency also, unless entering and inspecting agency premises would violate federal law or cause the denial of federal funding. See, section 601G.9. Again subject to the federal requirements, the Citizens' Aide may also attend hearings and observe proceedings conducted by the agency, if the permission of the interested party is obtained, even if the proceedings are confidential. See, section 601G.9. The Citizens' Aide has the power of subpoena to compel the production of documents and the appearance of witnesses under section 601G.9, subsection 4, although a witness probably cannot be forced to testify if they choose not to speak. See, section 601G.21. The Citizens' Aide may conduct hearings to facilitate an investigation. See, section 601G.8. It is not clear whether the hearing authority includes public hearings, although rules promulgated by the Citizens' Aide do authorize the use of public hearings. See, I.A.C., 210-2.3(3)(e); compare, 601G.8 and 601G.17.

Once an investigation is concluded, the Citizens' Aide may, although appears not to be required to, publish the results of the investigation and transmit them to the governor and general assembly. See, section 601G.17. If an opinion of the Citizens' Aide is adverse to an agency and the opinion is to be published, the published opinion has to include an unedited reply made by the agency, unless the affected official or agency excuses the inclusion of the reply. See, section 601G.17. The office must, if it finds that the agency under investigation should take action on the information that has been discovered, disclose the Citizens' Aide's recommendations to the agency in question, and the agency must reply to those recommendations within twenty working days of receipt of the recommendations. See, section 601G.16. If the Citizens' Aide finds that unfair or objectionable agency action has taken place due to the requirements of law, the Citizens' Aide is required to report to the General Assembly concerning recommended statutory changes. See, section 601G.16. The Citizens' Aide is also required to submit an annual report to the General Assembly and the Governor regarding the office's activities. If the annual report criticizes a named agency or official, the report must also contain an unedited reply to the criticism, unless the inclusion of the reply has been excused by the affected agency or official. See, section 601G.18.

The Office of Citizens' Aide does not possess any enforcement powers of its own. If a subpoena is disobeyed, the Citizens' Aide may initiate a court action to compel obedience. See, section 601G.9, subsection 4. The Citizens' Aide may not force an agency to comply with their recommendations. The Citizens' Aide may not prosecute an official or agency for criminal violations, although the office does appear to have the authority to investigate illegal activities and turn over any findings to the appropriate authorities. See, section 601G.11, subsection 1, and section 601G.19.

601G.1 DEFINITIONS.

As used in this chapter:

1. "Person" means an individual, aggregate of individuals, corporation, partnership, or unincorporated association.

2. "Agency" means all governmental entities, departments, boards, commissions, councils or institutions, and any officer, employee or member thereof acting or purporting to act in the exercise of official duties, but it does not include:

a. Any court or judge or appurtenant judicial staff.

b. The members, committees, or permanent or temporary staffs of the Iowa general assembly.

c. The governor of Iowa or the governor's personal staff.

d. Any instrumentality formed pursuant to an interstate compact and answerable to more than one state.

3. "Officer" means any officer of an agency.

4. "Employee" means any employee of an agency.

5. "Administrative action" means any policy or action taken by an agency or failure to act pursuant to law.

[C73, 75, 77, 79, 81, } 601G.1]

601G.2 OFFICE ESTABLISHED.

The office of citizens' aide is established.

[C73, 75, 77, 79, 81, } 601G.2]

601G.3 APPOINTMENT -- VACANCY.

The citizens' aide shall be appointed by the legislative council with the approval and confirmation of a constitutional majority of the senate and with the approval and confirmation of a constitutional majority of the house of representatives. The legislative council shall fill a vacancy in this office in the same manner as the original appointment. If the appointment or vacancy occurs while the general assembly is not in session, such appointment shall be reported to the senate and the house of representatives within thirty days of their convening at their next regular session for approval and confirmation.

The citizens' aide shall employ and supervise all employees under the citizens' aide's direction in such positions and at such salaries as shall be authorized by the legislative council. The legislative council shall hear and act upon appeals of aggrieved employees of the office of the citizens' aide.

[C73, 75, 77, 79, 81, } 601G.3]

601G.4 CITIZEN OF UNITED STATES AND RESIDENT OF IOWA.

The citizens' aide shall be a citizen of the United States and a resident of the state of Iowa, and shall be qualified to analyze problems of law, administration and public policy.

[C73, 75, 77, 79, 81, } 601G.4]

601G.5 TERM -- REMOVAL.

The citizens' aide shall hold office for four years from the first day in July of the year of approval by the senate and the house of representatives, and until a successor is appointed by the legislative council, unless the citizens' aide can no longer perform the official duties, or is removed from office. The citizens' aide may at any time be removed from office by constitutional majority vote of the two houses of the general assembly or as provided by chapter 66. If a vacancy occurs in the office of citizens' aide, the deputy citizens' aide shall act as citizens' aide until the vacancy is filled by the legislative council.

[C73, 75, 77, 79, 81, } 601G.5]

601G.6 DEPUTY -- ASSISTANT FOR PENAL AGENCIES.

The citizens' aide shall designate one of the members of the staff as the deputy citizens' aide, with authority to act as citizens' aide when the citizens' aide is absent from the state or becomes disabled. The citizens' aide may delegate to members of the staff any of the citizens' aide's authority or duties except the duty of formally making recommendations to agencies or reports to the governor or the general assembly.

The citizens' aide shall appoint an assistant who shall be primarily responsible for investigating complaints relating to penal or correctional agencies.

[C73, 75, 77, 79, 81, } 601G.6]

84 Acts, ch 1046, } 1

601G.7 PROHIBITED ACTIVITIES.

Neither the citizens' aide nor any member of the staff shall:

1. Hold another public office of trust or profit under the laws of this state other than the office of notary public.
2. Engage in other employment for remuneration with an agency against which a complaint may be filed under this chapter or that could create a conflict of interest or interfere in the performance of the person's duties under this chapter.
3. Knowingly engage in or maintain any business transactions with persons employed by agencies against whom complaints may be made

under the provisions of this chapter.

4. Be actively involved in partisan affairs.

[C73, 75, 77, 79, 81, } 601G.7]

84 Acts, ch 1046, } 2

601G.8 CLOSED FILES.

The citizens' aide may maintain secrecy in respect to all matters including the identities of the complainants or witnesses coming before the citizens' aide, except that the general assembly, any standing committee of the general assembly or the governor may require disclosure of any matter and shall have complete access to the records and files of the citizens' aide. The citizens' aide may conduct private hearings.

[C73, 75, 77, 79, 81, } 601G.8]

601G.9 POWERS.

The citizens' aide may:

1. Investigate, on complaint or on the citizens' aide's own motion, any administrative action of any agency, without regard to the finality of the administrative action, except that the citizens' aide shall not investigate the complaint of an employee of an agency in regard to that employee's employment relationship with the agency. A communication or receipt of information made pursuant to the powers prescribed in this chapter shall not be considered an ex parte communication as described in the provisions of section 17A.17.

2. Prescribe the methods by which complaints are to be made, received, and acted upon; determine the scope and manner of investigations to be made; and, subject to the requirements of this chapter, determine the form, frequency, and distribution of the conclusions and recommendations of the citizens' aide.

3. Request and receive from each agency assistance and information as necessary in the performance of the duties of the office. Notwithstanding section 22.7, pursuant to an investigation the citizens' aide may examine any and all records and documents of any agency unless its custodian demonstrates that the examination would violate federal law or result in the denial of federal funds to the agency. Confidential documents provided to the citizens' aide by other agencies shall continue to maintain their confidential status. The citizens' aide is subject to the same policies and penalties regarding the confidentiality of the document as an employee of the agency. The citizens' aide may enter and inspect premises within any agency's control and may observe proceedings and attend hearings, with the consent of the interested party, including those held under a provision of confidentiality, conducted by any agency unless the agency demonstrates that the attendance or observation would violate federal law or result in the denial of federal funds to that agency. This subsection does not permit the examination of records or access to hearings and proceedings which are the work product of an attorney under section 22.7, subsection 4, or which are privileged

communications under section 622.10.

4. Issue a subpoena to compel any person to appear, give sworn testimony, or produce documentary or other evidence relevant to a matter under inquiry. The citizens' aide, deputies, and assistants of the citizens' aide may administer oaths to persons giving testimony before them. If a witness either fails or refuses to obey a subpoena issued by the citizens' aide, the citizens' aide may petition the district court having jurisdiction for an order directing obedience to the subpoena. If the court finds that the subpoena should be obeyed, it shall enter an order requiring obedience to the subpoena, and refusal to obey the court order is subject to punishment for contempt.

[C73, 75, 77, 79, 81, } 601G.9; 82 Acts, ch 1026, } 1]

88 Acts, ch 1247, }1

601G.10 NO CHARGE FOR SERVICES.

No monetary or other charge shall be levied upon any person as a prerequisite to presentation of a complaint to the citizens' aide.

[C73, 75, 77, 79, 81, } 601G.10]

601G.11 SUBJECTS FOR INVESTIGATIONS.

An appropriate subject for investigation by the office of the citizens' aide is an administrative action that might be:

1. Contrary to law or regulation.
2. Unreasonable, unfair, oppressive, or inconsistent with the general course of an agency's functioning, even though in accordance with law.
3. Based on a mistake of law or arbitrary in ascertainments of fact.
4. Based on improper motivation or irrelevant consideration.
5. Unaccompanied by an adequate statement of reasons. The citizens' aide may also be concerned with strengthening procedures and practices which lessen the risk that objectionable administrative actions will occur.

[C73, 75, 77, 79, 81, } 601G.11]

601G.12 COMPLAINTS INVESTIGATED.

The citizens' aide may receive a complaint from any source concerning an administrative action. The citizens' aide shall conduct a suitable investigation into the administrative actions complained of unless the citizens' aide finds substantiating facts that:

1. The complainant has available another remedy or channel of complaint which the complainant could reasonably be expected to use.

2. The grievance pertains to a matter outside the citizens' aide power.

3. The complainant has no substantive or procedural interest which is directly affected by the matter complained about.

4. The complaint is trivial, frivolous, vexatious, or not made in good faith.

5. Other complaints are more worthy of attention.

6. The citizens' aide resources are insufficient for adequate investigation.

7. The complaint has been delayed too long to justify present examination of its merit.

The citizens' aide may decline to investigate a complaint, but shall not be prohibited from inquiring into the matter complained about or into related problems at some future time.

[C73, 75, 77, 79, 81, } 601G.12]

601G.13 NO INVESTIGATION -- NOTICE TO COMPLAINANT.

If the citizens' aide decides not to investigate, the complainant shall be informed of the reasons for the decision. If the citizens' aide decides to investigate, the complainant and the agency shall be notified of the decision. After completing consideration of a complaint, whether or not it has been investigated, the citizens' aide shall without delay inform the complainant of the fact, and if appropriate, shall inform the administrative agency involved. The citizens' aide shall on request of the complainant, and as appropriate, report the status of the investigation to the complainant.

[C73, 75, 77, 79, 81, } 601G.13; 82 Acts, ch 1026, } 2]

601G.14 INSTITUTIONALIZED COMPLAINANTS.

A letter to the citizens' aide from a person in a correctional institution, a hospital, or other institution under the control of an administrative agency shall be immediately forwarded, unopened to the citizens' aide by the institution where the writer of the letter is a resident. A letter from the citizens' aide to such a person shall be immediately delivered, unopened to the person.

[C73, 75, 77, 79, 81, } 601G.14]

601G.15 REPORTS CRITICAL OF AGENCY OR OFFICER.

Before announcing a conclusion or recommendation that criticizes an agency or any officer or employee, the citizens' aide shall consult with that agency, officer or employee, and shall attach to every report sent or made under the provisions of this chapter a copy of any unedited comments made by or on behalf of the officer, employee, or agency.

[C73, 75, 77, 79, 81, } 601G.15]

601G.16 RECOMMENDATIONS TO AGENCY.

If, having considered a complaint and whatever material the citizens' aide deems pertinent, the citizens' aide finds substantiating facts that:

1. A matter should be further considered by the agency;
2. An administrative action should be modified or canceled;
3. A rule on which an administrative action is based should be altered;
4. Reasons should be given for an administrative action; or
5. Any other action should be taken by the agency, the citizens' aide shall state the recommendations to the agency. If the citizens' aide requests, the agency shall, within twenty working days notify the citizens' aide of any action taken on the recommendations or the reasons for not complying with them.

If the citizens' aide believes that an administrative action has occurred because of laws of which results are unfair or otherwise objectionable, the citizens' aide shall notify the general assembly concerning desirable statutory change.

[C73, 75, 77, 79, 81, } 601G.16]

601G.17 PUBLICATION OF CONCLUSIONS.

The citizens' aide may publish the conclusions, recommendations, and suggestions and transmit them to the governor, the general assembly or any of its committees. When publishing an opinion adverse to an administrative agency or official the citizens' aide shall, unless excused by the agency or official affected, include with the opinion any unedited reply made by the agency.

Any conclusions, recommendations, and suggestions so published may at the same time be made available to the news media or others who may be concerned.

[C73, 75, 77, 79, 81, } 601G.17]

601G.18 REPORT TO GENERAL ASSEMBLY.

The citizens' aide shall by April 1 of each year submit an economically designed and reproduced report to the general assembly and to the governor concerning the exercise of the citizens' aide functions during the preceding calendar year. In discussing matters with which the citizens' aide has been concerned, the citizens' aide shall not identify specific persons if to do so would cause needless hardship. If the annual report criticizes a named agency or official, it shall also include unedited replies made by the agency or official to the criticism, unless excused by the agency or official affected.

[C73, 75, 77, 79, 81, } 601G.18; 82 Acts, ch 1026, } 3]

601G.19 DISCIPLINARY ACTION RECOMMENDED.

If the citizens' aide believes that any public official, employee or other person has acted in a manner warranting criminal or disciplinary proceedings, the citizens' aide shall refer the matter to the appropriate authorities.

[C73, 75, 77, 79, 81, } 601G.19]

601G.20 IMMUNITIES.

No civil action, except removal from office as provided in chapter 66, or proceeding shall be commenced against the citizens' aide or any member of the staff for any act or omission performed pursuant to the provisions of this chapter unless the act or omission is actuated by malice or is grossly negligent, nor shall the citizens' aide or any member of the staff be compelled to testify in any court with respect to any matter involving the exercise of the citizens' aide's official duties except as may be necessary to enforce the provisions of this chapter.

[C73, 75, 77, 79, 81, } 601G.20]

601G.21 WITNESSES.

A person required by the citizens' aide to provide information shall be paid the same fees and travel allowances as are extended to witnesses whose attendance has been required in the district courts of this state. Officers and employees of an agency shall not be entitled to such fees and allowances. A person who, with or without service of compulsory process, provides oral or documentary information requested by the citizens' aide shall be accorded the same privileges and immunities as are extended to witnesses in the courts of this state, and shall also be entitled to be accompanied and advised by counsel while being questioned.

[C73, 75, 77, 79, 81, } 601G.21]

601G.22 PENALTIES.

A person who willfully obstructs or hinders the lawful actions of the citizens' aide or the citizens' aide's staff, or who willfully misleads or attempts to mislead the citizens' aide in the citizens' aide's inquiries, shall be guilty of a simple misdemeanor.

[C73, 75, 77, 79, 81, } 601G.22]

601G.23 CITATION.

This chapter shall be known and may be cited as the "Iowa Citizens' Aide Act".

[C73, 75, 77, 79, 81, } 601G.23]

section 476.31 or 476.32, the public utility shall pay the expense reasonably attributable to the investigation, appraisal, service, or review. The board shall ascertain the expenses including certified expenses incurred by the consumer advocate division of the department of justice directly chargeable to the public utility under section 475A.6, and shall render a bill, ~~by-certified-mail~~, to the public utility, either at the conclusion of the investigation, appraisal, services, or review, or from time to time during its progress, which bill is notice of the assessment and shall demand payment. The total amount of such expense in any one calendar year, for which any public utility shall become liable, shall not exceed two-tenths of one percent of its gross operating revenues derived from intrastate public utility operations in the last preceding calendar year.

Sec. 73. Section 515B.12, Code 1989, is amended to read as follows:

515B.12 TAX EXEMPTION.

The association is exempt from payment of all fees and all taxes levied by this state or any of its subdivisions, except taxes levied on ~~real-or-personal~~ property.

Sec. 74. Section 533.24, unnumbered paragraph 1, Code 1989, is amended to read as follows:

A credit union shall be deemed an institution for savings and ~~shall-be~~ is subject to taxation only as to its real estate, ~~tangible-personal-property,~~ and moneys and credits. The shares shall not be taxed.

Sec. 75. Section 537.2501, subsection 1, paragraph f, as enacted by 1989 Iowa Acts, House File 552, section 2, is amended to read as follows:

f. With respect to open-end credit pursuant to a credit card issued by the creditor which ~~entitles~~ entitles the cardholder to purchase or lease goods or services from at least one hundred persons not related to the card issuer, the parties may contract for an over-limit charge not to exceed

ten dollars if the balance of the account exceeds the credit limit established pursuant to the agreement. The over-limit charge under this paragraph shall not be assessed again in a subsequent billing cycle unless in a subsequent billing cycle the account balance has been reduced below the credit limit.

If the differential treatment of this subsection based on the number of persons honoring a credit card is found to be unconstitutional, the parties may contract for the over-limit charge as described in this paragraph in any consumer credit transaction pursuant to open-end credit, and the other conditions relating to the over-limit charge shall remain in effect.

Sec. 76. Section 537.7103, subsection 3, paragraph a, subparagraph (1), Code 1989, is amended to read as follows:

(1) Notifying a debtor of the fact that the debtor debt collector may report a debt to a credit bureau or engage an agent or an attorney for the purpose of collecting the debt.

Sec. 77. Section 598.17, unnumbered paragraph 2, Code 1989, is amended to read as follows:

If at the time of trial petitioner fails to present satisfactory evidence that there has been a breakdown of the marriage relationship to the extent that the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved, the respondent may then proceed to present such evidence as though the respondent had filed the original petition.

Sec. 78. Section 601G.9, Code 1989, is amended by adding the following new subsection:

NEW SUBSECTION. 5. Establish rules relating to the operation, organization, and procedure of the office of the citizen's aide. The rules are exempt from chapter 17A and shall be published in the Iowa administrative code.

Sec. 79. Section 601K.33, subsection 5, Code 1989, is amended to read as follows:

"The commissioner may designate as a deputy county commissioner of elections any officer of a political subdivision who is required by law to accept nomination papers filed by candidates for office in that political subdivision, and when so designated that person shall assist the commissioner in administering elections conducted by the commissioner for that subdivision.

* * *

Section 53.11, Code of Iowa, 1973, as amended by §238 of H.F. 745 provides:

"The commissioner shall deliver an absentee ballot to any qualified elector applying in person *at his office* not more than forty days before the date of the general election and the primary election, and for all other elections, as soon as the ballot is available" (emphasis added)

Such §53.11 does not by its terms authorize personal applications for absentee ballots at any place other than the office of the county commissioner of elections. While it is true that this might impose some hardship on persons living some distance from the county seat who wish to personally vote absentee, there are other means available to them to exercise their franchise. For example, §53.2 of the Code, as amended by §235 of H.F. 745, provides a convenient means for making application by mail.

September 27, 1973

STATE OFFICERS: Ombudsman, Ch. 601G, Code, 1973. Office of Citizens Aide (Ombudsman) is to inquire into administrative actions of public agencies and duties do not encompass actions against attorneys in private practice. (Nolan to Potter, State Senator, 9/27/73) #73-9-28

Honorable Ralph W. Potter, State Senator, District 5: This office has received your letter requesting an Attorney General's opinion, on behalf of a constituent, concerning the question of whether the State Ombudsman is authorized to help people in a situation where they are unable to obtain an attorney to sue another attorney in a malpractice case.

The Citizens' Aide is an office set up to inquire into administrative actions of public agencies. The powers of this office are set out in Chapter 601G, Code of Iowa, 1973, and are limited by statute. Although the qualifications for the office of Citizens' Aide require that he be a citizen of the United States and a resident of the State of Iowa "qualified to analyze problems of law, administration and public policy", the law does not require that the Citizens' Aide be licensed to practice law in the courts of this state, further, §601G.1(5) defines administrative action as "any policy or action taken by an agency or failure to act pursuant to law". However, this same section of the Code excludes from the definition of agency "any court or judge or appurtenant judicial staff" (§601G.1 (2)(a)).

Accordingly, it is the view of this office that the duties of the Citizens' Aide do not include assisting individuals in bringing legal actions against attorneys in private practice. It is suggested that complaints of this nature be forwarded to the committee on grievances of the Iowa State Bar Association under the Supreme Court Rule 118. This rule provides in pertinent part:

"Every complaint against an attorney filed under this rule shall be signed and sworn to by a person or persons aggrieved, by the president and secretary of a regularly organized bar association of this state or by the chairman of a

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may designate as a deputy county commissioner of electoral subdivision who is required by law to accept office by candidates for office in that political subdivision, and no person shall assist the commissioner in administering the commissioner for that subdivision.

of Iowa, 1973, as amended by §238 of H.F. 745

shall deliver an absentee ballot to any qualified elector at the office not more than forty days before the date of the primary election, and for all other elections, as soon as possible (emphasis added)

by its terms authorize personal applications for office other than the office of the county commissioner and that this might impose some hardship on persons from the county seat who wish to personally vote at the means available to them to exercise their franchise. The Code, as amended by §235 of H.F. 745, provides a making application by mail.

September 27, 1973

Ombudsman, Ch. 601G, Code, 1973. Office of Citizens to inquire into administrative actions of public agencies encompass actions against attorneys in private practice. State Senator, 9/27/73) #73-9-28

Potter, State Senator, District 5: This office has requested an Attorney General's opinion, on behalf of the question of whether the State Ombudsman is in a situation where they are unable to obtain an attorney in a malpractice case.

An office set up to inquire into administrative actions and how this office are set out in Chapter 601G, Code limited by statute. Although the qualifications for the require that he be a citizen of the United States and a Iowa "qualified to analyze problems of law, administrative policy", the law does not require that the Citizens' law in the courts of this state, further, §601G.1(5) tion as "any policy or action taken by an agency or law". However, this same section of the Code extension of agency "any court or judge or appurtenant (a).

view of this office that the duties of the Citizens' Aide individuals in bringing legal actions against attorneys suggested that complaints of this nature be forwarded instances of the Iowa State Bar Association under the This rule provides in pertinent part:

Every attorney filed under this rule shall be signed for persons aggrieved, by the president and secretary or association of this state or by the chairman of a

regularly appointed committee of the Iowa State Bar Association and said complaint shall be sufficiently clear and specific in its charges to reasonably inform the attorney against whom the complaint is made of the misconduct he is claimed to have committed. All complaints, records, reports and papers filed under this rule shall be filed with and preserved by the Iowa State Bar Association at its headquarters office in Des Moines, Iowa."

October 1, 1973

CONSERVATION: Fishways in dams — §109.14, Code of Iowa, 1973. Clear and unambiguous provision of §109.14 require erection and maintenance of fishways in permanent dams or obstructions across waters of the state except by written approval of the state conservation director. (Peterson to Heying, State Senator, 10-1-73) #73-10-1

Honorable Hilarius L. Heying, State Senator: Receipt is hereby acknowledged of your request for an opinion of the Attorney General as to whether the fishway in the dam across the Turkey River at the Town of Elkader must be kept open so that fish can swim upstream.

Statutory provisions respecting fishways in dams are set forth in Section 109.14, Code of Iowa, 1973, which states:

"109.14 Dams — fishways. It shall be unlawful for any person, firm, or corporation to place, erect, or cause to be placed or erected, any dam or other device or contrivance in such manner as to hinder or obstruct the free passage of fish up, down, or through such waters, except as otherwise provided in this chapter. Dams for manufacturing or other lawful purposes may be erected across the waters of the state. No permanent dam or obstruction across such waters shall be erected or maintained which is not provided with a fishway, except by written approval of the state conservation director, nor shall any pumping station or plant except sand pumping and dredging machines, in or connected with such waters be constructed or operated except by written approval of the state conservation director, which is not provided with screens to prevent fish from entering the pumping station or plant. Such fishways and screens shall be constructed and used according to the plans and specifications prepared and furnished by the director. Any dam, obstruction, or pumping plant which is not so constructed is a public nuisance and may be abated accordingly."

The requirement for fishways in dams first appeared in Iowa law in 1876. Acts of the 16th General Assembly, Chapter 70, which simply prohibited the erection of a dam without a fishway. In 1939, the section was amended to its present form prohibiting the erection "or maintenance" of a "permanent" dam without a fishway "except by written approval of the state conservation director".

The language of the statute is clear and unambiguous and the Supreme Court of Iowa has found the requirement stated therein to be a legitimate exercise of the police power of the state. *State vs. Beardsley*, 1899, 108 Iowa 396, 79 N.W. 138; *State vs. Meek*, 1900, 112 Iowa 338, 84 N.W. 3. Thus, a fishway must be provided in an existing permanent dam so as to permit the free passage of fish up or down the river unless the maintenance of the dam without such a fishway has the written approval of the state conservation director.

As a practical matter, however, one seeking to enforce maintenance of a fishway in a particular dam across waters of the state should be aware of the

library's board of trustees. They determine the manner in which it will be disbursed. However, any such fines must be deposited in the library accounts and a proper record and accounting thereof must be maintained.

November 20, 1973

OMBUDSMAN: Investigations — the Iowa State Bar Association is not a public agency within the meaning of §601G, Code of Iowa, 1973. (Nolan to Potter, State Senator, 11-20-73) #73-11-18

Honorable Ralph W. Potter, State Senator: In response to your request for an opinion on the question of whether the Iowa State Bar Association is a public agency subject to investigation by the State Ombudsman Office, I can advise that the answer is no. The Iowa State Bar Association is a nonprofit corporation chartered under §504A of the Code of Iowa.

The authority of the Citizens' Aide (Ombudsman) is directed to the investigation of complaints against public agencies. Under the provisions of §601G.1(2), agency means:

"... all governmental entities, departments, boards, commissions, councils or institutions, and any officer, employee or member thereof acting or purporting to act in the exercise of his official duties, but it does not include:

- a. Any court or judge or appurtenant judicial staff.
- b. The members, committees, or permanent or temporary staffs of the Iowa general assembly.
- c. The governor of Iowa or his personal staff.
- d. Any instrumentality formed pursuant to an interstate compact and answerable to more than one state."

November 20, 1973

STATE OFFICES AND DEPARTMENTS: Beer and Liquor Control Department—§33.1, Code of Iowa, 1973; S.F. 512, Acts of the 65th G.A., First Session. A state employee can be required to work on the Friday after Thanksgiving, and the only remedy that employee has is that he or she shall be given an alternative day off from work. (Coriden to Gallagher, Director, Iowa Beer & Liquor Control Department, 11-20-73) #73-11-19

Mr. Rolland A. Gallagher, Director, Iowa Beer & Liquor Control Department: You have requested an opinion as to whether your employees must be given the Friday after Thanksgiving off as a holiday. It is our opinion that the Friday after Thanksgiving is not a legal holiday as defined in §33.1, 1973 Code of Iowa. Senate File 512, passed by the 65th General Assembly, First Session, does include the Friday after Thanksgiving as one of eight paid holidays which are to be given to state employees. However, Senate File 512 goes on to say that:

"... In most cases, where by nature of the employment a state employee must be required to work on a holiday the provisions of unnumbered paragraph one (1) of this section shall not apply, however he shall be compensated by an alternative day off from employment with pay."

Thus, the holidays listed are not mandatory. A state employee can be required to work on the Friday after Thanksgiving, and the only remedy that employee has is that he or she shall be given an alternative day off from work.

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an administrator, he would be placed in the contracting with himself and in licensing himself. The statute refers to the director and a facility's contracting with each other, the director would, in licensing himself. See e.g., §§125.17, 125.25, 125.33, references do not envision such a situation.

States and agencies do enjoy licensing powers while in facilities, but this latter power is expressly in statutes. For instance, the director of the Iowa Department is given clear authority to establish, operate liquor stores. Section 123.20(2). The Code. Department of Social Services Division of Child Welfare to administer programs involving neglected, delinquent children but also is clearly to administer the state training school for boys and girls, and the Code on 217.8, The Code. The director of the Division of Child Welfare is particularly required to control and operate institutions. Section 217.11, The Code. These provisions lend support to the argument that if the director of the Department of Substance Abuse were to lease a treatment facility, it would have clearly exceeded the ambit of Chapter 125.

At this point, it should also be noted that Chapter 125 does not give the director the power to lease a building for a facility; furthermore, departmental authority is limited in such a way as to provide for the state-controlled institution. 1979 Session, 68th General Assembly, on the other hand, the director of the Iowa Beer and Wine Control Board is granted the express power to rent, lease land, to lease plants and to lease or buy equipment, clerks, agents and other employees as is provided in the provisions of the chapter. Section 123.20 though no mention is made in the statute itself of the various divisions of the Department of Social Services to hire personnel, these divisions administer existing buildings and staff; legislative appropriations provide funds for the operation of these facilities. E.g., 1979 Session, 68th G.A., ch. 8, §3(1) (for training school, Mitchellville training school and other facilities); ch. 8, §5(1) (for operation of Fort Madison, Anaktogale, Mount Pleasant, John Bennett Center, etc.); ch. 8, §7(1) (for state hospital-schools at Iowa). Certainly the legislature is under no obligation to appropriate funds or to specifically provide for the hiring of personnel, but the fact that the statute typically specify such matters further indicates that the legislature does not intend for the Department of Substance Abuse to lease a treatment facility.

At this point which should be noted is that if the director were to lease a treatment facility, that facility would be operated by employees who would be state employees, paid by the comptroller's office. These employees would be

hired by the department. The appropriations chapter allows the Department to hire no more than twenty-six point eight, (26.8) fulltime equivalent positions for the 1980 fiscal year. The Department may be limited by this number in hiring employees for a treatment facility. This fact is a further indication of a legislative intent which did not encompass administration of a treatment facility by the Department of Substance Abuse.

Consequently, it is our opinion that the legislature intended for the Department of Substance Abuse to operate in a developing, coordinating, cooperating and supervising capacity. The director may establish and maintain treatment programs but this power does not also provide the power to actually administer a treatment facility. The Department assures that adequate treatment is provided substance abusers through program development, through program implementation by licensing, by coordination of treatment services, and by training those engaged in the treatment of substance abusers. The director is given the expressed power to advance beyond his primary statutory powers and responsibilities of coordinating and supervising treatment programs and facilities to directly contract with facilities to provide treatment for substance abusers at a cost to the department. A similar power to administer a treatment facility is not expressly granted to the director, nor does §125.12(4) impliedly grant such authority. Without a clearer statement from the legislature, it is our opinion that the statute does not intend the director to enjoy the power to administer a treatment facility.

July 11, 1980

STATE OFFICERS AND DEPARTMENTS: Authority of the Citizens' Aide/Ombudsman to administer a prisoner legal assistance program. Chapter 601G, The Code 1979; 1978 Session, 67th G.A., ch. 1018, §6(e); 1979 Session, 68th G.A., ch. 8, §11; H. F. 2580, 68th G.A., 1980 Session. The Citizens' Aide/Ombudsman's Office has no present statutory authority or responsibility to administer a prisoner legal assistance program. The Office may participate in such program only to the extent permitted by the appropriation made in Chapter 1018, §6(e), of the Acts of the 67th General Assembly, 1978 Session. (Stork to Angrick, Citizens' Aide/Ombudsman, 7-11-80) #80-7-11(L)

July 17, 1980

COUNTIES AND COUNTY OFFICERS; MUNICIPALITIES; CITY ASSESSOR: Payment for expenses. Ch. 441; §§441.1, 441.2, 441.16, The Code 1979. The County auditor does not have the authority to deny claims submitted by the city assessor for payment nor does the county board of supervisors serve in a supervisory capacity over the assessor. The city assessor is not subject to the same rules and procedures as the rest of the subdivisions of county government, however, the conference board may establish rules and regulations governing expenditures of funds by the city assessor. (Bennett to Davis, Scott County Attorney, 7-17-80) #80-7-12(L)

July 17, 1980

MENTAL HEALTH: EVIDENCE: Physician-patient privilege. Chapter 229, §§229.8, 229.12(3), 229.52, 622.10, The Code 1979. The testimonial communications rule establishing physician-patient privilege, as a general concept, applies to ch. 229 involuntary commitment proceedings. The physician-patient privilege has been eliminated where a patient is examined for diagnostic purposes under ch. 229. A court may adhere to but is not bound by the formal rules of evidence in

Implicit in every complaint of "discrimination" is an allegation of an intentional violation of the Iowa Civil Rights Act. (Swanson to Reis, Director, Iowa Civil Rights Commission, 7/13/82) #82-7-5

Ms. Artis Reis, Executive Director, Iowa Civil Rights Commission: You have requested an opinion of the attorney general concerning whether the Iowa Civil Rights Commission has jurisdiction over a complaint alleging discrimination against the Citizens' Aide, Ombudsman Office as a public accommodation.

The Citizens' Aide/Ombudsman Office, is first of all, a "public accommodation" within the statutory definition. The term "public accommodation" includes "each state and local government unit or tax-supported district of whatever kind, nature or class that offers services, facilities, benefits, grants or goods to the public, gratuitously or otherwise." Section 601A.2(10), The Code 1981.

It is considered an unfair practice to discriminate against certain classes of persons in the furnishing of such accommodations. Section 601A.7, The Code 1981, provides, in part, as follows:

"1. It shall be an unfair or discriminatory practice for any owner, lessee, sublessee, proprietor, manager, or superintendent of any public accommodation or any agent or employee thereof:

a. To refuse or deny to any person because of race, creed, color, sex, national origin, religion or disability the accommodations, advantages, facilities, services, or privileges thereof, or otherwise to discriminate against any persons because of race, creed, color, sex, national origin, religion or disability in the furnishing of such accommodations, advantages, facilities, services, or privileges. . . ."

By an Act of the Iowa General Assembly in 1965, the Iowa Civil Rights Commission was established and given certain powers and duties, among them, being . . .

"...to receive, investigate, and finally determine the merits of complaints alleging unfair or discriminatory practices, [and] to investigate and study the existence, character, causes and extent of discrimination in public accommodations, . . . and to attempt the elimination of such discrimination by education and conciliation." Section 601A.5, The Code 1981.

The Citizens' Aide/Ombudsman Office was established by statute in 1972 and codified in chapter 601G, The Code 1981, with certain authority, responsibilities and immunities. Section 601G.20, The Code 1981, provides as follows:

"Immunities. *No civil action, except removal from office as provided in chapter 66, or proceeding shall be commenced against the citizens' aide or any member of his staff for any act or omission performed pursuant to the provisions of this chapter unless the act or omission is actuated by malice or is grossly negligent, nor shall the citizens' aide or any member of his staff be compelled to testify in any court with respect to any matter involving the exercise of his official duties except as may be necessary to enforce the provisions of this chapter.*" [Emphasis supplied.]

The term "proceeding" would include filing or acting upon a complaint alleging discrimination by the Iowa Civil Rights Commission.

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specific. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, 67 L.Ed.2d 207, 216, 101 S.Ct. 1089 (1981).

The *Burdine* Court, in affirming *McDonald* and *Sweeney*, supra, discussed this burden of respondent as follows:

"If the [respondent] carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the [respondent] thus serves simultaneously to meet the [complainant's] prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the [complainant] will have a full and fair opportunity to demonstrate pretext. The sufficiency of the [respondent's] evidence should be evaluated by the extent to which it fulfills these functions." 450 U.S., at 255, 67 L.Ed.2d, at 216, 101 S.Ct. 1089.

That a complainant in a chapter 601A proceeding has the burden of proving intentional discrimination was recently made clear by the Iowa Supreme Court in *Linn Co-op Oil Co. v. Quigley*, 305 N.W.2d 729, 733 (Iowa 1981), which cited with approval from *McDonald*, *Sweeney*, and *Burdine*, supra:

"[Complainant] now must have the opportunity to demonstrate that the proffered reason [of the respondent] was not the true reason for the [treatment]. This burden now merges with the ultimate burden of persuading the [commission] that it has been the victim of intentional discrimination. It may succeed in this either directly by persuading the [commission] that a discriminatory reason more likely motivated the [respondent] or indirectly by showing that the [respondent's] proffered explanation is unworthy of belief."

If the complainant fails to meet this burden, the complaint should be dismissed. If, however, the burden is met, the requisite showing of intentional discrimination would satisfy the question of immunity. Each complaint and the facts of each case must be determined and judged on an individual basis within the legal framework described above. The Iowa Civil Rights Commission does have jurisdiction to investigate and determine complaints of discrimination against the Citizens' Aide/Ombudsman Office as a public accommodation.

July 15, 1982

GENERAL ASSEMBLY: Resignations; Special Elections to Fill Vacancies; Special Sessions. Ch. 69, The Code 1981; §§69.2, 69.4, 69.14, The Code 1981. The resignation of a state legislator becomes final once it is submitted to the designated public official pursuant to §§69.2(4) and 69.4(2) and the effective date specified in the resignation has passed. When a vacancy exists prior to or after the time a special session of the legislature is announced, §69.14 requires a special election be held. Ten days' notice of election is required if the special session will convene within forty-five days of the date the session is announced; forty days' notice is required if the special session will convene forty-six days or more from that same date. While the special election process must be set in motion once the special session is announced, there is no requirement that the vacancy be filled before the special session convenes, or that the special session be postponed until the vacancy is filled. (Weeg to Holden, Chairperson, Mortgage Problems Joint Subcommittee, 7/15/82) #82-7-6

July 27, 1976

STATE OFFICERS AND DEPARTMENTS: Citizens' Aide; Public Records; Criminal History and Intelligence Data. §§601G.9 and 68A.7 and Chapter 749B, Code of Iowa, 1975. The Citizens' Aide may not examine a peace officer agency's confidential records unless such records can be and are released as the Code provides. (Linge to Cusack, State Representative, 7-27-76) #76-7-23

The Honorable Gregory D. Cusack, State Representative: You have requested an opinion of the Attorney General about the investigatory powers of Iowa's Citizens' Aide. You wish to know if the law prohibits the Citizens' Aide's access to reports and documents on file in Iowa peace officer agencies.

Chapter 601G of the Code of Iowa, 1975, contains the provisions regarding the Citizens' Aide. Section 601G.9 states, in part:

"The citizens' aide shall have the following powers: * * *

3. He may request and shall be given by each agency such assistance and information as may be necessary in the performance of his duties. He may examine the records and documents of all agencies *not specifically made confidential by law*. He may enter and inspect premises within any agency's control." (Emphasis added)

The files of Iowa peace officer agencies contain many kinds of records and documents. Some are specifically made confidential by statute. Section 68A.7, Code of Iowa, 1975, states, in part:

"The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release information: * * *

5. Peace officers investigative reports, except where disclosure is authorized elsewhere in this Code. * * *

9. Criminal identification files of law enforcement agencies. However, records of current and prior arrests shall be public records. * * *

11. Personal information in confidential personnel records of public bodies including but not limited to cities, boards of supervisors and school districts."

Chapter 749B, Code of Iowa, 1975, contains several provisions regarding the confidentiality of some peace officer agency records and documents. Section 749B.1 provides, in part:

"As used in this chapter, unless the context otherwise requires: * * *

3. 'Criminal history data' means any or all of the following information maintained by the department or bureau in a manual or automated data storage system and individually identified:

- a. Arrest data.
- b. Conviction data.
- c. Disposition data.
- d. Correctional data. * * *

11. 'Intelligence data' means information collected where there are reasonable grounds to suspect involvement or participation in criminal activity by any person."

Section 749B.18 provides:

"Nothing in this chapter shall prohibit the public from examining

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July 27, 1976

DEPARTMENTS: Citizens' Aide; Public Records and Intelligence Data. §§601G.9 and 68A.7 of the Code of Iowa, 1975. The Citizens' Aide may not release any confidential records unless such release is authorized as the Code provides. (Linge to Iowa Code, 7-27-76) #76-7-23

Mr. Cusack, State Representative: You have advised the Attorney General about the investigatory reports and documents on file in Iowa peace officer agencies.

Section 601G.9 of the Code of Iowa, 1975, contains the provisions regarding the release of information. Section 601G.9 states, in part:

"The following powers: * * *

"The assistance shall be given by each agency such as necessary in the performance of his duties, and documents of all agencies *not specifically designated*. He may enter and inspect premises of any agency. (Emphasis added)

"Peace officer agencies contain many kinds of records, some of which are specifically made confidential by statute. Section 601G.9 of the Code of Iowa, 1975, states, in part:

"Records shall be kept confidential, unless otherwise provided by law, the lawful custodian of the records, or by the Citizens' Aide to release information: * * *

"Investigative reports, except where disclosure is specifically authorized by the Code. * * *

"Files of law enforcement agencies. How- ever, records of prior arrests shall be public records. * * *

"Records of confidential personnel records of public employees in cities, boards of supervisors and other agencies."

Section 601G.9 of the Code of Iowa, 1975, contains several provisions regarding the release of information. Section 601G.9 states, in part:

"Unless the context otherwise requires: * * *

"The release of information means any or all of the following information: (1) information in a manual or automated file which is individually identified;

"(2) information collected where there are no records of involvement or participation in criminal activities; and

"(3) information which shall prohibit the public from examining or copying the public records of any public body or agency as authorized by chapter 68A."

or copying the public records of any public body or agency as authorized by chapter 68A.

"Criminal history data and intelligence data in the possession of the department or bureau, or dissemination by the department or bureau, are not public records within the provisions of chapter 68A."

Section 749B.2 provides, in part:

"The department and bureau may provide copies or communicate information from criminal history data only to criminal justice agencies, or such other public agencies as are authorized by the confidential records council."

Section 749B.3 provides:

"A peace officer, criminal justice agency, or state or federal regulatory agency shall not disseminate criminal history data, within or without the agency, received from the department or bureau, unless:

1. The data is for official purposes in connection with prescribed duties of a criminal justice agency, and

2. The agency maintains a list of the persons receiving the data and the date and purpose of the dissemination, and

3. The request for data is based upon name, fingerprints, or other individual identification characteristics.

"A peace officer, criminal justice agency, or state or federal regulatory agency shall not disseminate intelligence data, within or without the agency, received from the department or bureau or from any other source, except as provided in subsections 1 and 2."

Because the Citizens' Aide is prohibited from examining records and documents specifically made confidential by law and these statutes do make the described records and documents confidential, the Citizens' Aide would not have a right of access to such records and documents.

July 27, 1976

STATE OFFICERS AND DEPARTMENTS: Volunteer Employment — §25A.2, Code of Iowa, 1975; §§1. 2. 7, Ch. 80, Acts of the 66th G.A. (1975). One who performs services for the State, upon request of the State, upon request of the State, without compensation, may fall within the purview of Chapter 25A of the Code for purposes of employee defenses and indemnification. (Blumberg to Pawlewski, Commissioner, State Department of Health, 7-27-76) #76-7-24

Mr. Norman L. Pawlewski, Commissioner, State Department of Health: We have received your opinion request of July 9, 1976, regarding Chapter 25A, 1975 Code of Iowa. Your department is planning a program for mass immunization of persons within the State for swine-like influenza. Because of the size of the program volunteers, consisting of doctors, nurses and lay persons, will be used. These individuals will provide medical supervision and administer the vaccine among other things. Most of these individuals will not be compensated and all are merely volunteers. You ask whether these individuals fall within the protection of Chapter 25A. We assume that you are referring to the recent amendments to that chapter.

Chapter 80, Acts of the 66th G.A. (1975), amended Chapter 25A of the Code to provide liability protection for state employees. Section

CITIZENS' AIDE[210]

(OMBUDSMAN)

Chapter 1-6 rescinded and the following chapter 1-8 published 9/16/81 and effective 10/21/81, adopted 9/16/81

<p>CHAPTER 1 ORGANIZATION</p> <p>1.1(601G) Function 1.2(601G) Operation</p>	<p>4.5(17A) Statement of reasons 4.6(17A) Petition for rulemaking 4.7(17A) Procedure after petition is filed</p>
<p>CHAPTER 2 PROCEDURES</p> <p>2.1(601G) Intake methods 2.2(601G) Jurisdiction 2.3(601G) Investigations 2.4(601G) Hearings 2.5(601G) Case disposition after investigation 2.6(601G) Review</p>	<p>CHAPTER 5 CONFIDENTIALITY</p> <p>5.1(601G,68A) Public information 5.2(601G) Private information 5.3(601G) Confidential information 5.4(601G) Request for information in citizens' aide/ombudsman files</p>
<p>CHAPTER 3 DECLARATORY RULINGS</p> <p>3.1(17A) General 3.2(17A) Petition for declaratory rulings 3.3(17A) Procedure after petition is filed</p>	<p>CHAPTER 6 PRIVILEGES AND IMMUNITIES</p> <p>6.1(601G) Privileges and immunities</p>
<p>CHAPTER 4 RULEMAKING</p> <p>4.1(17A,601G) Commencing rulemaking 4.2(17A,601G) Oral presentations 4.3(17A) Conferences or consultation 4.4(17A) Adoption</p>	<p>CHAPTER 7 PENALTIES</p> <p>7.1(601G) Penalties</p>
	<p>CHAPTER 8 FORMS</p> <p>8.1(601G) Subpoena form 8.2(601G) Patient waiver form 8.3(601G) General information waiver form</p>

CHAPTER 1 ORGANIZATION

210—1.1(601G) Function. The citizens' aide/ombudsman office was created pursuant to chapter 601G, The Code, and is charged with the responsibility to accept and investigate complaints and render an objective opinion or recommendation on a complaint from a member of the public about an action or inaction of an agency of the state or local government in Iowa, and by doing so, resolving citizens' complaints and improving administrative processes and procedures.

210—1.2(601G) Operation.

1.2(1) Location. The office of the citizens' aide/ombudsman is located at 515 E. 12th Street, Des Moines, Iowa 50319. The phone number is area code (515) 281-3592. Office hours

are 8:00 a.m. to 4:30 p.m., Monday through Friday.

1.2(2) Method of contacting citizens' aide/ombudsman. Citizens may contact the citizens' aide/ombudsman office by phone, mail or personal visit.

No appointment is necessary to visit the office of the citizens' aide/ombudsman. No specific form of complaint or inquiry shall be required. The citizens' aide/ombudsman may request that a complaint be reduced to writing. There is no charge to the citizen making the complaint to the citizens' aide/ombudsman office as provided in Iowa Code, section 601G.19.

1.2(3) Composition of staff. The office of the citizens' aide/ombudsman consists of:

a. The citizens' aide/ombudsman. The position of citizens' aide/ombudsman is created by section 601G.3, and he/she is appointed by the legislative council as directed in section 601G.3, The Code. The citizens' aide/ombudsman is generally responsible for employing and supervising all employees under his/her direction in the positions and at the salaries as shall be authorized by the legislative council. The citizens' aide/ombudsman may delegate to members of the staff any of his/her authority or duties except the duty of formally making recommendations to agencies or reports to the governor or the general assembly.

b. Deputy citizens' aide/ombudsman. The deputy is appointed by the citizens' aide/ombudsman and has the authority to act as citizens' aide/ombudsman when the citizens' aide/ombudsman is absent from the state or becomes disabled as provided in section 601G.6, The Code.

c. Assistant for corrections. The assistant for corrections shall be responsible for investigating complaints relating only to penal or correctional agencies as provided in section 601G.6, The Code.

d. Legal analyst. The legal analyst serves as chief legal counsel within the citizens' aide/ombudsman office.

e. Assistants. Assistant citizens' aide/ombudsmen receive and investigate citizen complaints and assume those responsibilities delegated by the citizens' aide/ombudsman as provided in section 601G.3.

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[Filed 8/1/84, Notice 6/20/84—published 8/29/84, effective 10/3/84]

CHAPTER 2 PROCEDURES

210—2.1(601G) Intake methods.

2.1(1) Review and evaluation of complaints. Complaints may be received from any source and shall be investigated unless:

- a.* The complainant has available another remedy or channel of complaint which he/she could reasonably be expected to use;
- b.* The complaint pertains to a matter outside of the citizens' aide/ombudsman authority;
- c.* The complainant has no substantive or procedural interest which is directly affected by the matter complained about;
- d.* The complaint is trivial, frivolous, vexatious or not made in good faith;
- e.* Other complaints are more worthy of attention;
- f.* The citizens' aide/ombudsman's resources are insufficient for adequate investigation;
- g.* The complaint has been delayed too long to justify present examination on its merits;
- h.* There is insufficient evidence to initiate investigation;
- i.* A previous determination has been made by the citizens' aide/ombudsman on the matter.

2.1(2) Self-initiation powers. Pursuant to the authority in section 601G.9(1), The Code, the citizens' aide/ombudsman may investigate on his/her own motion. The citizens' aide/ombudsman shall exercise discretion in investigating complaints from an anonymous source.

210—2.2(601G) Jurisdiction.

2.2(1) Exclusions. Notwithstanding the potential for administrative or judicial review and without regard to the finality of the agency action, the citizens' aide/ombudsman office has jurisdiction to investigate actions of agencies of state and local government in Iowa. "Agency" means all governmental entities, departments, boards, commissions, councils or institutions, and any officer, employee or member thereof acting or purporting to act in the exercise of his/her official duties, but it does not include:

- a. Any court or judge or appurtenant judicial staff. Appurtenant judicial staff does not include court agencies, e.g., clerk of court, friend of court;
- b. The members, committees, or permanent or temporary staffs of the Iowa general assembly;
- c. The governor or his/her personal staff;
- d. Any instrumentality formed pursuant to an interstate compact and answerable to more than one state;
- e. The complaint of an employee of an agency regarding his/her direct employment relationship with the agency as provided in section 601G.9, The Code;
- f. Agencies and officials of the federal government;
- g. The private sector.

2.2(2) Referrals. Citizens with complaints and information requests deemed to be outside the jurisdiction of the citizens' aide/ombudsman may be referred to the appropriate governmental agency or other appropriate body.

2.2(3) Information requests. Information about state and local government may be given upon request.

210—2.3(601G) Investigations.

2.3(1) Subjects for investigation. An appropriate subject for investigation by the citizens' aide/ombudsman shall include but not be limited to administrative actions that might be:

- a. Contrary to law or rule;
- b. Unreasonable, unfair, oppressive, or inconsistent with the general course of an agency's functioning, even though in accordance with the law;
- c. Based on a mistake of law or arbitrary in ascertainment of fact;
- d. Based on improper motivation or irrelevant consideration;
- e. Unaccompanied by an adequate statement of reasons.

2.3(2) Notice of decision to investigate.

- a. If a decision is made not to investigate, the complainant shall be informed of the reasons for the decision.
- b. If a decision is made to investigate, the complainant and the agency shall be notified of the decision.
- c. The citizens' aide/ombudsman may make a verbal or written investigative inquiry to determine whether need exists for further investigation.

2.3(3) Investigative tools. In investigating a complaint, the citizens' aide/ombudsman may utilize the following methods:

- a. Inspection of relevant records;
- b. Witness statements, informal or under oath;
- c. An on-site visit or inspection;
- d. A review of applicable law and regulation;
- e. ~~and~~ public or private hearing;

- f. The issuance of a subpoena to compel testimony or the production of records;
- g. A request for a statement from the agency providing reasons why an administrative action was taken.

This rule is intended to implement Iowa Code chapter 601G as amended by 1982 Iowa Acts, chapter 1026.

210—2.4(601G) Hearings.

2.4(1) Definitions.

a. **Hearing.** A hearing conducted under Chapter 601G, The Code, is not a contested case hearing as described in Chapter 17A, The Code. A hearing is the taking of testimony relative to a matter before the citizens' aide/ombudsman where one, some, or all parties may be present. A hearing before the citizens' aide/ombudsman does not affect the substantive rights of a citizen or the agency. The hearing is an internal device used by the citizens' aide/ombudsman to gather information and to assist in arriving at conclusions or recommendations regarding an agency's action.

b. **Party.** The complainant or the person or agency complained against.

c. **Counsel.** A party may be represented by anyone whom he/she may authorize to act in his/her behalf, including a member of the Iowa bar.

d. **Witness.** Any person who may be called to give testimony relating to a matter before the citizens' aide/ombudsman.

2.4(2) Scheduling of hearings. Hearings may be held at the discretion of the citizens' aide/ombudsman and may be requested, arranged, and conducted informally. Hearings may be conducted at the office of the citizens' aide/ombudsman or elsewhere at the discretion of the citizens' aide/ombudsman.

2.4(3) Witnesses.

a. If a witness fails to attend a hearing after being notified, the hearing may be postponed or the citizens' aide/ombudsman or designated deputy may choose to proceed. A subpoena may be issued to compel a witness to appear and give testimony. The subpoena may be delivered either by personal service as in civil actions or by certified mail return receipt requested. If a witness fails to respond to the citizens' aide/ombudsman's subpoena, action may be taken to enforce the subpoena through the district court.

b. A witness may be orally examined under oath. Any witness has the right to have counsel present during the hearing. Counsel may advise the witness during questioning and may register objections to questions asked. Objections shall be noted but the witness shall answer all questions except when the witness asserts the right against self-incrimination or when the witness asserts some other privilege or immunity that would normally be extended to a witness in the courts of this state.

2.4(4) Manner of conducting hearing. The order for the taking of evidence shall be at the discretion of the citizens' aide/ombudsman or his/her designated deputy. Questions shall be posed by the citizens' aide/ombudsman or deputy. At the citizens' aide/ombudsman or deputy's discretion, the witness or witnesses may be examined privately or may be sequestered. At the conclusion of the citizens' aide/ombudsman or deputy's examination of a witness, a party or his/her counsel may be permitted to examine the witness, after which the citizens' aide/ombudsman or deputy may inquire into new matters so raised. The citizens' aide/ombudsman or deputy may limit questions and exclude witnesses or other persons in order to maintain proper decorum.

2.4(5) Evidence. Strict rules of evidences shall not apply; the probative nature of any evidentiary matter shall be determined by the citizens' aide/ombudsman or his/her designated deputy. Irrelevant, immaterial or unduly repetitious evidence may be excluded.

2.4(6) Record. A record of the hearing may be made on tape or by a certified court reporter. Witnesses shall be permitted to record any testimony that they may give. A written transcript of the hearing may be made at the discretion of the citizens' aide/ombudsman. If a transcript is made, witnesses shall be permitted to obtain, upon request, a written copy of any testimony that they may give. If no transcript is made, tapes shall be preserved for at least sixty calendar days.

Parallel IAPA

Parallel IAPA

2.4(7) Ex parte communication.

a. The office of the citizens' aide/ombudsman does not hold contested case hearings as described in Chapter 17A, The Code. Communications made to the citizens' aide/ombudsman by any party, hearing officer, witness or counsel shall not be considered to be ex parte communication as defined in section 17A.17, The Code.

b. The office of the citizens' aide/ombudsman has the authority under section 601G.9, The Code, to investigate without regard to the finality of the administrative action. Communications made by the citizens' aide/ombudsman during the course of its investigation of an agency's administrative action shall not be considered as ex parte communications.

210—2.5(601G) Case disposition after investigation.

2.5(1) Conclusions and recommendations. At the conclusion of an investigation, the citizens' aide/ombudsman shall take the matter under advisement. Any conclusions or recommendations shall be reported to the complainant and to the agency, if appropriate. If the agency's action is deemed appropriate and pursuant to applicable law and rule, no further action shall be taken. As provided in section 601G.16, The Code, if the agency action was deemed to be inappropriate or not pursuant to the applicable law or rule, the citizens' aide/ombudsman may recommend that:

- a. The matter be further considered by the agency;
- b. An administrative action be modified or canceled;
- c. A rule on which an administrative action is based be altered;
- d. Reasons be given for an administrative action;
- e. Any other action be taken by the agency; or
- f. Disciplinary or criminal proceedings be initiated.

2.5(2) Reports. At the conclusion of an investigation, the citizens' aide/ombudsman may formally issue a report to an agency which may include recommendations to the agency. The report containing the conclusions, recommendations and, in the case of critical reports, comments from the agency, shall be reported to the governor and general assembly. After reporting to the governor and general assembly, reports become public information and may be disseminated by the citizens' aide/ombudsman to the media and the general public.

a. The citizens' aide/ombudsman may issue a report critical of an agency. Prior to a report critical of an agency being issued, the affected agency must first be given the opportunity to comment on the conclusions and recommendations. The affected agency shall be given not less than five days to comment. The citizens' aide/ombudsman reserves the right to comment on the response of the agency.

b. The citizens' aide/ombudsman may issue a special report containing observations, recommendations and conclusions which are not critical of an agency.

c. The citizens' aide/ombudsman may issue a report to the general assembly or its committees. The citizens' aide/ombudsman may also present oral testimony to the general assembly or its committees.

210—2.6(601G) Review. A person wishing a review of any action taken or decision made by a deputy of the citizens' aide/ombudsman or staff may do so by contacting the citizens' aide/ombudsman directly.

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[Filed 11/5/82, Notice 6/23/82—published 11/24/82, effective 12/29/82]

**CHAPTER 3
DECLARATORY RULINGS**

210—3.1(17A) General. Any interested person may solicit oral or written advice from the citizens' aide/ombudsman concerning the application or interpretation of any statute or administrative rule dealing with the office of citizens' aide/ombudsman. However, unless the request is made pursuant to section 17A.9, The Code, petition for declaratory ruling, any advice is not binding upon the citizens' aide/ombudsman. Petitioners for a declaratory ruling

17A applies

must have a real and direct interest in a specific fact situation which may affect their legal rights, duties or responsibilities under statutes or rules administered by the citizens' aide/ombudsman.

210—3.2(17A) Petition for declaratory rulings. A petition for a declaratory ruling shall be filed in the office of the Citizens' Aide/Ombudsman at 515 E. 12th Street, Des Moines, Iowa 50319. The petition shall either be mailed certified, return receipt requested or delivered in person. An additional copy may be provided if the petitioner wishes to retain a filed stamped copy of the petition. The petition may be typewritten or legibly printed in ink and must substantially conform to the following:

CITIZENS' AIDE/OMBUDESMAN
Capitol Complex
515 East 12th Street
Des Moines, Iowa 50319

Petition by _____ (Name))
For a Declaratory Ruling on) **PETITION FOR**
(state statute, rule citation) **DECLARATORY RULING**
to be ruled on) -----

- (petition must state in separate, numbered paragraphs)
1. Petitioner's name, address and phone number.
 2. A clear, concise and complete statement of all relevant facts on which the ruling is requested.
 3. A clear and concise statement of the controversy or uncertainty.
 4. Reference to the statutory authority or rules in question, along with attached copies.
 5. The reasons for prompting the petition and a full disclosure of petitioner's interest.
 6. Whether petitioner is currently a party to an investigation by the citizens' aide/ombudsman, rulemaking or judicial proceeding involving the controversy or uncertainty.
 7. The names and addresses, when known, of other persons who may be affected by the declaratory ruling.

(Petitioner's signature)

210—3.3(17A) Procedure after petition is filed.

3.3(1) Initial review. Upon filing of the petition the citizens' aide/ombudsman shall inspect the petition for substantial compliance with the recommended form, and may, in his/her discretion, reject a petition which fails to contain one or more of the required statements.

a. The citizens' aide/ombudsman shall conduct an initial review of the petition and may request the petitioner to provide additional facts or provide greater specificity and detail in the questions posed. A request shall be made within fourteen days of the filing of the petition. If the requested information is not provided within thirty days of the receipt of the request, the petitioner will be deemed to have withdrawn the petition.

b. The citizens' aide/ombudsman shall then issue a ruling or declination to rule within thirty days of the receipt of additional information or of the filing of the petition, whichever is later.

3.3(2) Citizens' aide/ombudsman action. After due consideration, the citizens' aide/ombudsman may decline to issue a ruling upon one or more of the following grounds:

- a. The issue in question is currently involved in a rulemaking, investigative, legislative or judicial proceeding.
- b. The petition does not contain sufficient facts to demonstrate that the petitioner will be aggrieved or adversely affected by failure to issue a declaratory ruling.
- c. The petitioner presents issues or facts which are unclear, overbroad or otherwise inappropriate as a basis upon which to issue a declaratory ruling.
- d. The petition indicates the petitioner seeks to obtain approval to engage in activities so borderline as to be of dubious legality, although perhaps marginally proper.
- e. The issue in question has been rendered moot by a change in circumstances, fact or law.
- f. The issue in question depends upon peculiar facts which cannot be predicted or accurately described in advance.
- g. Other good and sufficient reasons, which shall be detailed in writing.

3.3(3) Effect of declaratory ruling. A declaratory ruling by the citizens' aide/ombudsman is binding upon both the citizens' aide/ombudsman and the petitioner on the questions of law dealt with in the ruling.

3.3(4) Declaratory rulings issued by the citizens' aide/ombudsman shall be public record and shall be maintained in the office of the citizens' aide/ombudsman in chronological order.

[Filed 8/26/81, Notice 7/22/81—published 9/16/81, effective 10/21/81]

CHAPTER 4 RULEMAKING

210—4.1(17A,601G) **Commencing rulemaking.** The citizens' aide/ombudsman shall give notice of its intention to adopt, amend or repeal a rule by publishing the text of the proposed change, or a summary of the issues and subject matter to be considered and the time, place, and manner in which interested persons may comment upon the proposal, in the Iowa administrative bulletin. In the event the text is too voluminous for publication, the notification shall state the subject matter of the proposed rule, a summary of changes from the existing rule, if any, and the location and telephone number where interested persons may obtain the actual text. The notice shall also include the name and address of a person to whom interested persons may present written views and arguments, and the deadline by which these submissions may be submitted. This person shall be responsible for the review and summarization of all submissions.

210—4.2(17A,601G) **Oral presentations.** When requested by the persons or groups enumerated in section 17A.4(1) "b", The Code, an opportunity for an oral presentation shall be scheduled. The request must be presented at the citizens' aide/ombudsman office within twenty days of the publication of the Notice of Intended Action and must identify the proposed rule subject to the request by ARC number and by the specific citation to the proposed rule upon which presentations are to be made.

4.2(1) **Notice.** When so requested under the provisions of rule 4.2(17A,601G) or in his/her discretion, the citizens' aide/ombudsman shall schedule an opportunity for oral presentations by publishing a notice of the opportunity in the Iowa administrative bulletin, which shall refer to the ARC number and citation of the proposed rule, and which shall give the public not less than twenty days notice of the date, time and place of the meeting. Additional notice shall be mailed to all persons who have requested the opportunity for an oral presentation.

4.2(2) **Conduct of meetings.** The citizens' aide/ombudsman or designee shall serve as the presiding officer at the meetings. At the commencement of the meeting the presiding officer shall request any person wishing to make an oral presentation to advise the presiding officer of his/her name, address and affiliation.

a. At the commencement of the meeting the presiding officer shall give a brief synopsis of the proposed rule, a statement of the statutory authority and the reasons for the proposed rule. When necessary in the interests of time, the presiding officer may limit individual presentations as necessary to ensure that all persons who have requested an opportunity to speak may do so.

b. To facilitate the exchange of information and if time permits, the presiding officer may open the floor to questions or general discussion.

c. Persons who disrupt or obstruct the meeting either by their behavior or by the use of a camera or recording device shall be requested to cease. The presiding officer shall exclude any person who fails to comply with the request.

d. The presiding officer shall, when practical, receive all relevant physical and documentary evidence presented by witnesses. All evidence becomes the property of the citizens' aide/ombudsman office.

e. A record shall be prepared consisting of the minutes or verbatim record, and all evidence submitted. The presiding officer shall then prepare a summary of the content of all comments received at the meeting.

210—4.3(17A) Conferences or consultation. In addition to the required rulemaking procedures, the citizens' aide/ombudsman or designee may obtain viewpoints or advice concerning proposed rulemaking through informal conferences or consultations as he/she may deem desirable.

210—4.4(17A) Adoption. Not less than thirty-five days after the publication of notice, the proposed rule may be adopted in final form, and, if so adopted, shall be made effective pursuant to the provisions of section 17A.5, The Code.

210—4.5(17A) Statement of reasons. If so requested by any interested person, pursuant to the provisions of section 17A.4(1), The Code, and upon adoption of any proposed rule, the citizens' aide/ombudsman shall prepare a statement of principal reasons for and against the proposed rule containing the reasons for overruling considerations urged against the rule.

210—4.6(17A) Petition for rulemaking. A petition for rulemaking shall be filed in the Citizens' Aide/Ombudsman Office, 515 E. 12th Street, Capitol Complex, Des Moines, Iowa 50319. The petition shall either be mailed certified, return receipt requested, or may be delivered in person. An additional copy may be provided if the petitioner wishes to retain a filed stamped copy of the petition. The petition shall be either typewritten or legibly printed in ink and must substantially conform to the following form:

CITIZENS' AIDE/OMBUDSMAN
Capitol Complex
515 East 12th Street
Des Moines, Iowa 50319

Petition by _____ (Name))
)
to (Amend, Adopt, or Repeal)
)
Rules Relating to (state)
)
subject matter))
)
)
)
)
)

PETITION FOR RULEMAKING

(petition must state in separate, numbered paragraphs)

- 1. Petitioner's name, address and phone number.
- 2. The nature of petitioner's interest in the matter.
- 3. The text or substance of any requested rule adoption, amendment or repeal including the text and citation for any current rule in effect.
- 4. The reasons for seeking the requested action, including any statute, rule, data, evidence or arguments which are relevant to the request. Copies of any statute, rule, evidence, etc. should be attached to the petition.

(Petitioner's signature)

210—4.7(17A) Procedure after petition is filed.

4.7(1) Inspection by the citizens' aide/ombudsman. Upon filing of the petition the citizens' aide/ombudsman shall inspect the petition to ensure substantial compliance with the recommended form. If the petition does not contain the text or substance of the proposed amendment or any reasons for the proposed amendment or fails to include copies of any cited statute, rule or evidence, the citizens' aide/ombudsman may reject the petition and return it to the petitioner along with the reasons for the rejection. Petitioner may then correct the reasons for rejection and refile the petition.

4.7(2) Citizens' aide/ombudsman action. Within sixty days of the filing of a petition the citizens' aide/ombudsman shall either grant the petition and commence rulemaking, or deny the petition and notify the petitioner in writing of the grounds for the denial.

[Filed 8/26/81, Notice 7/22/81—published 9/16/81, effective 10/21/81]

CHAPTER 5
CONFIDENTIALITY

210—5.1(601G,68A) Public information. Any information held by the citizens' aide/ombudsman that is public information as defined by chapter 68A, The Code, shall be released by the citizens' aide/ombudsman's office upon request.

5.1(1) Citizens' aide/ombudsman public reports, annual reports, and declaratory rulings are public information and shall be released upon request.

5.1(2) Information in citizens' aide/ombudsman's files that is public under chapter 68A, The Code, and has been provided by another agency may be released by the citizens' aide/ombudsman.

a. Anyone requesting such a document may be directed to obtain that document from the agency that is the custodial agency.

b. If it is not certain whether information held by citizens' aide/ombudsman is public

information under chapter 68A, The Code, the citizens' aide/ombudsman shall require the request to be made directly to the custodial agency.

210—5.2(601G) Private information. Section 601G.8, The Code, provides that the citizens' aide/ombudsman may maintain secrecy regarding the records and files of the office of the citizens' aide/ombudsman. Accordingly, private information is that which is not public information under chapter 68A, The Code, and is not specifically confidential by some other section of the Code.

5.2(1) The name of a citizen contacting the citizens' aide/ombudsman is private information and this name shall not be released to any person not directly involved in the handling of the case unless the citizen has authorized the release of that fact either orally or in writing or unless it has been determined that the citizen has waived this right by his/her actions. However, complaints and requests for information which are nonjurisdictional to the citizens' aide/ombudsman or that will not be handled by the citizens' aide/ombudsman may be referred to another agency or organization by the citizens' aide/ombudsman without prior approval of the complainant.

5.2(2) A citizen may request that his/her identity be held as private. Such requests will be respected unless it would be impossible for the citizens' aide/ombudsman to pursue the complaint without identifying the complainant. In such cases, the citizens' aide/ombudsman shall contact the citizen, before investigation, to determine if he/she would like to withdraw the complaint.

5.2(3) The citizens' aide/ombudsman has no affirmative duty to inform one providing information that it can be held as private. If a request is made that information be held as private, the citizens' aide/ombudsman will determine, under his/her authority in Iowa Code section 601G.8, whether he/she will respect this request. If a determination is made to hold certain information as private by the citizens' aide/ombudsman, such information may later become public if a report made pursuant to 2.5(2) is issued.

5.2(4) When the citizens' aide/ombudsman believes that any public official, employee or other person has acted in a manner warranting criminal or disciplinary proceedings, he/she shall refer the matter to the appropriate authorities. The citizens' aide/ombudsman has an affirmative duty to disclose this obligation to any person at any time he/she realizes that information about such acts may be proffered.

210—5.3(601G) Confidential information. Confidential information is any information defined as confidential by state or federal law. Confidential information cannot be released by the citizens' aide/ombudsman except to those persons having lawful access. The citizens' aide/ombudsman is subject to the same policies and penalties regarding the confidentiality of the information as an employee of the agency that provided the information. The citizens' aide/ombudsman case closings, internal notes, memoranda and correspondence shall be considered confidential information pursuant to Iowa Code section 601G.8.

210—5.4(601G) Request for information in citizens' aide/ombudsman files.

5.4(1) All public information shall be disclosed upon request.

5.4(2) All information that a citizen has provided to the citizens' aide/ombudsman or that he/she has previously received shall be released to a citizen or his/her counsel. All information that a governmental official has provided to the citizens' aide/ombudsman or that he/she has previously released shall be released to the official or his/her counsel.

5.4(3) Confidential information shall not be provided to any person unless that person has lawful access.

5.4(4) All requests for information from the citizens' aide/ombudsman files shall be in writing. Costs for reproduction of documents may be assessed as provided in Iowa Code section 68A.3.

5.4(5) The citizens' aide/ombudsman will provide open access to the files, at the written request of the governor, the general assembly or standing committee of the general assembly pursuant to Iowa Code section 601G.8.

These rules are intended to implement Iowa Code chapter 601G as amended by 1982 Iowa Acts, chapter 1026.

[Filed 8/26/81, Notice 7/22/81—published 9/16/81, effective 10/21/82]

[Filed 11/5/82, Notice 6/23/82—published 11/24/82, effective 12/29/82]

CHAPTER 6 PRIVILEGES AND IMMUNITIES

210—6.1(601G) Privileges and immunities.

6.1(1) No civil action, except removal from office, as provided in chapter 66, The Code, or proceeding shall be commenced against the citizens' aide/ombudsman or any member of his/her staff for any act or omission performed pursuant to the provisions of this chapter unless the act or omission is actuated by malice or is grossly negligent.

6.1(2) The citizens' aide/ombudsman or any member of his/her staff shall not be compelled to testify in any court with respect to any matter involving the exercise of his/her official duties except as may be necessary to enforce the provisions of chapter 601G, The Code.

[Filed 8/26/81, Notice 7/22/81—published 9/16/81, effective 10/21/81]

CHAPTER 7 PENALTIES

210—7.1(601G) Penalties. Any person who willfully obstructs or hinders the lawful actions of the citizens' aide/ombudsman or a member of the citizens' aide/ombudsman's staff or who willfully misleads or attempts to mislead the citizens' aide/ombudsman in his/her inquiries shall be guilty of a simple misdemeanor. The citizens' aide/ombudsman shall refer all violations of this section to the county attorney in the county where the obstruction or hinderance occurred.

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CHAPTER 8 FORMS

210—8.1(601G) Subpoena form. Citizens' aide/ombudsman form number CA/O-1 is a subpoena/subpoena duces tecum form.

210—8.2(601G) Patient waiver form. Citizens' aide/ombudsman form number CA/O-2 is an authorization for medical or hospital information form.

210—8.3(601G) General information waiver form. Citizens' aide/ombudsman form number CA/O-3 is an authorization for release of information form.

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T E N T A T I V E A G E N D A
SERVICE COMMITTEE OF THE LEGISLATIVE COUNCIL

Wednesday, July 19, 1989

Senate Room 22

10:00 a.m. Call to Order

Roll Call

Review of Minutes of Meeting of June 21, 1989
(Previously distributed)

Parental and Family Leave Policy

Authority of Citizens' Aide/Ombudsman Office
Legislative Service Bureau
Mary Whitman - Iowa State Association of Counties
Bill Angrick - Citizens' Aide/Ombudsman
Correspondence to Senator Vande Hoef

Legal Research Policy for Legislative Service Bureau

Expenditure of Midwestern Legislative Conference Funds

Retention of Legal Counsel for Item Veto Issues

Personnel Reports (Compensatory Time, Merit
Increases, Positions Filled)

Report of Computer Subcommittee

Voice Information Processing

ADDITIONAL BUSINESS, IF ANY

Adjournment

Agenda, service719
rj/dg/20