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IN THE SUPREME COURT OF IOWA

Supreme Court No. 21-1765

AUDITOR OF THE STATE OF IOWA,
ROB SAND,
Plaintiff-Appellant,

vs.

AN UNNAMED LOCAL GOVERNMENT RISK POOL,
Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
POLK COUNTY NO. IFIF009635
THE HONORABLE JEFFREY FARRELL PRESIDING

FINAL BRIEF OF APPELLEE

Andrew Tice AT0007968
Kristine Stone AT0008828
AHLERS & COONEY, P.C.
100 Court Avenue, Suite 600
Des Moines, Iowa 50309
Telephone: (515) 243-7611
Facsimile: (515) 243-2149
Email: atice@ahlerslaw.com
kstone@ahlerslaw.com

ATTORNEYS FOR APPELLEE

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ROUTING STATEMENT

The Unnamed Local Government Risk Pool (the "Pool") does not agree with the Routing Statement in the brief of the Auditor of State ("AOS"). This case concerns settled matters of law and should be assigned to the Court of Appeals.

STATEMENT OF THE CASE

This case arises out of the AOS' assertion of authority to perform an involuntary reaudit of a local government risk pool. The Pool is a local government risk pool created in 1986 pursuant to the authority of Iowa Code § 670.7. (Exhibits E & K, APP. pp. 33-42, 92-101, 142-152). The Pool is audited annually by a private accounting firm. (TRANS. p. 80, APP. pp. 399, 406). While these audit reports are made public, the Pool has not filed its audits with AOS. (TRANS. p. 83, APP. p. 399). Prior to the events involved in these proceedings, the Pool had never received any request for an audit or reaudit from the AOS. (TRANS. pp. 79, 83, APP. pp. 399, 406).

On January 14, 2021, the AOS issued an investigative subpoena, pursuant to Iowa Code § 11.51, to the Pool and demanded certain documents from the Pool. (Exhibit B, APP.

pp. 25-26, 84-85). In responding, the Pool maintained it was not subject to audit by the AOS, but provided responses to many of the requests from the AOS in a conciliatory gesture. (Exhibit C, APP. pp. 27-31, 86-90). The Pool declined to voluntarily provide claims handling materials due to relevance and confidentiality concerns. *Id.*

The AOS filed an Application to Enforce Subpoena in Polk County District Court on March 16, 2021. (App. to Enforce Subpoena, APP. pp. 7-23). An evidentiary hearing was held on September 3, 2021. At the hearing, the AOS argued the Pool is a *de facto* 28E entity and is, therefore, subject to audit or reaudit by the AOS. The district court issued its order on October 22, 2021, denying the AOS' Application to Enforce Subpoena. (APP. pp. 414-425). In its order, the district court rejected the AOS' *de facto* 28E argument. The AOS filed a notice of appeal on November 18, 2021. (APP. pp. 426-428).

STATEMENT OF FACTS

In September 2019, the Pool was the subject of several newspaper articles regarding out-of-state travel by its board

members. (TRANS. p. 12, APP. p. 402). Shortly thereafter, the AOS issued a letter to the Pool indicating that "certain procedures [would] be performed for [the Pool]" based upon "an Associated Press news article in September and information I have reviewed since then" with the unidentified/unlimited costs of those procedures being billed to the Pool. (Exhibit 6, APP. p. 194). The Pool responded by disputing the AOS' authority to impose "certain procedures" upon the Pool and requesting details regarding the proposed "procedures". (Exhibit 7, APP. pp. 195-196).

The AOS then issued a second letter requesting "records related to payments by [the Pool] for payroll, reimbursements, travel costs, and settlements". (Exhibit 8, APP. pp. 197-198). The AOS argued the Pool met the definition of a "governmental subdivision", while "acknowledg[ing] there is some ambiguity". *Id.* Since that time, the Pool voluntarily provided the AOS with links to the Pool's expenditures, board member travel expenses, board member reimbursements, board member travel costs and expenses, and payments other than reimbursements to board

members. (TRANS. pp. 27-28, Exhibit 9, APP. pp. 199-200). The Pool also provided the AOS with requested 1099s for its board members. (TRANS. pp. 28-29, Exhibit 11, APP. pp. 204-225). The Pool declined to voluntarily provide claims handling materials to the AOS due to relevance and confidentiality concerns. (Exhibit C, APP. pp. 27-31, 86-90). The AOS issued investigative subpoenas seeking these and other records. (Exhibits A & 10, APP. pp. 24-26, 201-203). Aside from providing many of the requested documents to the AOS, the Pool consistently maintained that it is not subject to the AOS' jurisdiction. (Exhibits 7 & 9, APP. pp. 195-196, 199-200).

The AOS is authorized to audit or reaudit governmental subdivisions. Iowa Code § 11.6. Under Chapter 11, a "governmental subdivision" is defined as:

> **cities and administrative agencies established by cities, hospitals or health care facilities established by a city, counties, county hospitals organized under chapters 347 and 347A, memorial hospitals organized under chapter 37, entities organized under chapter 28E, community colleges, area education agencies, and school districts.**

Iowa Code § 11.1(1)(c). The Pool is not a "governmental subdivision" as that term is defined by statute and the AOS, therefore, does not have the authority or jurisdiction to audit or reaudit the Pool.

Initially, the AOS claimed it was entitled to perform "certain procedures" on the Pool based upon the "public interest" surrounding the board member travel issue. (Exhibit 6, APP. p. 194). In later correspondence, however, the AOS altered its position claiming jurisdiction and stated, "it is the [AOS'] position that given [the Pool's] relationship to and creation by Iowa public entities and the important public policy questions involved, [the Pool] fits the definition found at [Iowa Code § 11.]1(1)(c) and should be subject to audit by this office." (Exhibit 8, APP. pp. 197-198). The AOS did not then mention or otherwise contend the Pool was a chapter 28E entity. *Id.*

In March 2021, the AOS again altered its position in an effort to find jurisdiction by raising an argument the Pool was a 28E entity and, thereby, subject to the AOS' audit jurisdiction. (App. to Enforce Subpoena, APP. pp. 7-23). With this newest

argument, the AOS now contends the Pool is a *de facto* 28E entity arguing:

1. The Pool's formation documents track the statutory language found in Iowa Code Chapter 28E (Brief at 22)

2. Iowa Code Sec. 670.7 does not by itself create a risk pool (Brief at 25)

3. Iowa caselaw has recognized *de facto* 28E entities (Brief at 33)

4. There are no other plausible manners by which the Pool can operate other than as a 28E entity (Brief at 38)

The Pool disagrees with the assertions made by the AOS in this matter and believes Iowa law supports the district court's order denying the AOS' Application to Enforce Subpoena. That ruling should be affirmed.

ARGUMENT

I. THE DISTRICT COURT WAS CORRECT IN DENYING THE AOS' APPLICATION TO ENFORCE SUBPOENA.

Preservation of Error. The Pool does not contend there is any preservation of error problem.

Standard of Review. The standard of review for the enforcement of an administrative subpoena is for an abuse of

discretion by the lower court. *Sand v. Doe*, 959 N.W.2d 99, 104 (Iowa 2021).

Argument. The district court did not abuse its discretion in denying the AOS' Application to Enforce Subpoena in this matter. A motion to enforce an agency's subpoena will be granted only if the subpoena is: "(1) within the statutory authority of the agency, (2) reasonably specific, (3) not unduly burdensome, and (4) reasonably relevant to the matters under investigation." *Iowa City Human Rights Comm'n v. Roadway Express, Inc.*, 397 N.W.2d 508, 510 (Iowa 1986).

The district court correctly concluded the Pool is not a 28E entity and is, therefore, not subject to the AOS' audit authority pursuant to Iowa Code § 11.1(1)(c). The Application to Enforce Subpoena must, therefore, be denied and the ruling of the district court must be affirmed.

Separately, there is further reason the AOS' administrative subpoena should be denied because the AOS failed to establish the specific authority necessary to perform a reaudit. Even more, the subpoena should be limited or denied because the

AOS seeks materials not reasonably relevant to the matters under investigation.

A. The Pool is Not a 28E Entity.

1. <u>The fact that the Pool's formation documents include terms found in Iowa Code Chapter 28E does not mean the Pool is a 28E entity</u>.

The Pool is a local government risk pool created for the purpose of facilitating municipalities joining together to protect themselves from liability, as authorized by Iowa Code § 670.7. Iowa Code Chapter 670 defines a municipality as a "city, county, township, school district, a chapter 28E entity as provided in section 670.4, subsection 1, paragraph 'p', and any other unit of local government except soil and water conservation districts." Iowa Code § 670.1(2).

Municipalities join and participate in the Pool by executing a Risk Management Agreement. (Exhibits E & K, APP. pp. 33-42, 92-101, 142-152). The Pool is currently comprised of slightly less than 800 members, including cities, counties, townships, 28E organizations, emergency management

agencies, empowerment boards, county fairs, transit authorities, and more. (TRANS. p. 52, APP. p. 406).

The Risk Management Agreement sets forth obligations and responsibilities of members of the Pool, the Pool's board of directors, and the Pool's administrator. (Exhibits E & K, APP. pp. 33-42, 92-101, 142-152). It describes the funds and coverages available to members of the Pool, and how a member may leave the Pool. *Id.* It further provides that the Pool shall have a perpetual duration, until terminated pursuant to the terms of the Agreement. *Id.*

It must be recognized that nowhere within the Risk Management Agreement did the Pool or any of its members rely upon or otherwise reference Chapter 28E. *Id.* The AOS argues that because the Risk Management Agreement includes terms that would be required by Iowa Code Chapter 28E, the Pool has, therefore, created itself as a 28E entity. What the AOS fails to acknowledge, however, is that any well-drafted contract will contain many, if not all, of the terms required by Iowa Code Chapter 28E.

Iowa Code § 28E.5 requires a 28E agreement to include the following terms:

> 1. Its duration.
>
> 2. The precise organization, composition and nature of any separate legal or administrative entity created thereby together with the powers delegated thereto, provided such entity may be legally created. …
>
> 3. Its purpose or purposes.
>
> 4. The manner of financing the joint or cooperative undertaking and of establishing and maintaining a budget therefor.
>
> 5. The permissible method or methods to be employed in accomplishing the partial or complete termination of the agreement and for disposing of property upon such partial or complete termination.
>
> 6. Any other necessary and proper matters.

None of these terms are unique to 28E entities or any particular agreement. Any well-drafted contract or agreement will generally identify its term, whether a separate entity is being created, the purpose of the agreement, how contractual activities will be paid for, and how the agreement may be terminated. This is because "an agreement, in order to

be binding, must be sufficiently definite to enable the courts to give it an exact meaning." 1 *Williston on Contracts* § 4:21 (4th Ed.). Iowa Code § 28E.5 outlines the most basic terms that are included in nearly all written contracts or agreements. The fact that the Risk Management Agreement includes these terms is, therefore, not surprising and it cannot mean that the Pool intended to be formed as a 28E entity. Indeed, when a municipality enters into a standard insurance agreement with any insurer, it would likely include provisions to address the duration of the agreement, its purposes, the financial requirements, how termination would be effectuated, and various other terms and conditions. Jody Smith, the Pool's longtime board chair, testified that in his work with cities, he has come across intergovernmental agreements, and not all intergovernmental agreements are 28Es. (TRANS. p. 87). In its ruling, the district court also noted that "not every contract involving a governmental body has to meet the requirements of chapter 28E." (Ruling, p. 6, APP. p. 419). It must also be recognized and considered that nowhere in the Risk

Management Agreement does the Pool rely upon or even reference the provisions of Chapter 28E.

The AOS' argument relies heavily upon Iowa Code § 28E.5 in analogizing to portions of the Pool's Risk Management Agreement, which is vastly more comprehensive than the several enumerated statutory requirements. At the same time, the AOS minimizes the import of statutorily-required filings with the Secretary of State, arguing the absence of filings is not a defense. This Court previously acknowledged that "Chapter 28E, however, requires the parties to enter into an agreement containing specific provisions, and that the agreement be properly filed and recorded." *Warren County Bd. of Health v. Warren County Bd. of Supervisors*, 654 N.W.2d 910, 914 (Iowa 2002)(emphasis added). Indeed, Iowa Code § 28E.5(1) very clearly requires that any 28E agreement be filed with the Secretary of State. Initial and biennial reports must likewise be filed. Iowa Code § 28E.8(2). The Pool never filed any such agreement with the Secretary of State at its inception nor did it subsequently file any initial or biennial reports for the simple

reason that it is not a 28E entity. (TRANS. pp. 87-88, APP. p. 409).

2. Iowa courts have already recognized the Pool as a § 670.7 entity.

The AOS implies that the Pool has somehow intentionally evaded the scrutiny of the AOS' office since 1986 and that it has been secretly operating in violation of Chapter 28E throughout that time. However, the AOS failed to present any evidence that would support making such unsupported accusations and nothing could be further from the truth. The district court recognized the absurdity of such an insinuation stating "…it is not like [the Pool] was a tiny entity hiding undercover for those 33 years. [The Pool] has 800 government bodies as part of its membership." (Ruling, p. 10. APP. p. 423). Even more, there have been two appellate cases publicly discussing the Pool. *See First Sierra Equities, LLC v. Signature Partners-Des Moines, Ltd.*, 715 N.W.2d 768 (Table) (Iowa App. 2006); *Diercks v. City of Bettendorf*, 929 NW2d 273 (Table) (Iowa App. 2019). Clearly, the Pool has not been intentionally hiding from the AOS, as the AOS maintains without supportive evidence or good cause.

Notably, in neither of the cases discussing the Pool did the Iowa Court of Appeals describe the Pool as a 28E entity. In its ruling, the district court noted that in the *Diercks* case, the court referred to the Pool as "a risk pool as outlined in section 670.7." 929 NW2d 273 (Table). This is precisely how the Pool has described itself over the past 36 years since its formation.

For the AOS to now argue the Pool intentionally has been operating in a clandestine manner since 1986 to avoid the scrutiny of the AOS' office is baseless and absurd. The Pool has been operating in the open and subject to judicial scrutiny. In more than 35 years of operations, no court has ever concluded that the Pool is operating unlawfully or doing so as a *de facto* 28E entity. The AOS' most recent and current argument to create a newfound and expanded jurisdiction over the Pool is hollow, unsupported by the facts, and contrary to the historical practice and experience of the Pool.

3. Iowa law does not support the involuntary creation of a 28E entity.

The AOS argues the Pool is a *de facto* 28E entity based upon *City of Windsor Heights v. Spanos*, 572 N.W.2d 591, 593-

594 (Iowa 1997). Brief at 33-34. The AOS' argument is a self-serving effort to broaden its authority to include the Pool within the definition of a "governmental subdivision" under Chapter 11. The *Windsor Heights* case, however, involved a situation where the governmental entities agreed that "a valid 28E agreement existed", even though they failed to follow the requirements spelled out under Chapter 28E. *Id.* at 594. In that particular and unique circumstance, the Court agreed "the city attorney had *de facto* authority to prosecute charges within the scope of the alleged 28E agreement". *Id.* The case at bar is readily distinguishable from the *Windsor Heights* case as the Pool has expressly denied and refuted the AOS' effort to involuntarily recharacterize the Pool's existence into a disputed 28E entity. (TRANS. p. 60. APP. p. 405). Additionally, the AOS never produced any evidence that any other of the many parties to the Risk Management Agreement believed it to be a 28E agreement. The undisputed facts of the case at bar show the statutory prerequisites for the creation of a valid 28E agreement

were not met and, further, that no party to the agreement in place believed it to be a 28E agreement.

The AOS critiques the district court's distinguishment of the *Windsor Heights* precedent to this case. Brief at 34. First, AOS discards the district court's observation that "none of the parties to [the Pool] agreement have asserted that it was made pursuant to chapter 28E" by claiming the driver in *Windsor Heights* "was not in agreement", which blithely overlooks the relative insignificance of the driver's thoughts when compared with actual parties to the subject agreement. Second, the AOS contends the Court would not have applied a "results-oriented analysis" when applying "the doctrine of officers de facto". *Id.* However, the consideration of "public good" was part of the analysis of the doctrine in *Windsor Heights*.[1] Third, the district court observed "the court's decision in [*Windsor Heights*] to enforce the spirit of the agreement is not inconsistent with [the

1 In *Windsor Heights*, the Court quoted prior precedent observing "[i]t would be contrary to the public good, and produce only uncertainty and confusion, were we to allow defendants like [Spanos] to collaterally attack the authority of a public official who was otherwise [granted the authority to prosecute]." 572 N.W.2d at 594 (quoting *State v. Driscoll*, 455 N.W.2d 916, 918 (Iowa 1990)).

Pool's] claim here." (Ruling, p. 8, APP. p. 421). The AOS offered no response to this distinguishment by the district court.

It should also be noted the *Windsor Heights* case turned upon application of "the doctrine of officers de facto", not the establishment of a valid 28E agreement. Therein, the Court discussed whether "[t]he de facto officer theory applies where a *qualified* official, by *technical infirmity*, does not validly hold the official position." *Windsor Heights*, 572 N.W.2d at 593-94 (quoting *State v. Palmer*, 554 N.W.2d 859, 865-66 (Iowa 1996)). The Court ultimately recognized the evidence was deficient to establish a valid Chapter 28E agreement and found the city attorney "lacked the actual authority to prosecute state traffic and misdemeanor charges". *Id.* at 594. The Court found *de facto* authority only after finding "an apparent defect in the process by which that power was delegated". *Id.* There is no "defect" in the case at bar as the Pool has quite successfully provided its services over an extended time since 1986.

The AOS also erroneously relies upon *Hawkeye Foodservice Distribution, Inc. v. Iowa Educator's Corporation,* as

authority to allow the Court to involuntarily pronounce that the Pool is a 28E entity despite its repeated assertions that it is not a 28E entity. 812 N.W.2d 600, 605-606 (Iowa 2012). (App. to Enforce Subpoena, ¶ 43, APP. p. 18). Importantly, the *Hawkeye Foodservice* case never reached that conclusion. It only addressed whether the plaintiff had standing to bring a claim that Chapter 28E had been violated and whether such a claim would survive a motion to dismiss. *Id.* at 606, 612. The Court in *Hawkeye Foodservice* did not resolve whether the Pool must enact a 28E agreement or, as the district court noted, whether Iowa Code § 670.7 is sufficient authority for the establishment of the Pool.

Together, the AOS relies upon legal authorities that would grant a peace officer *de facto* authority to prosecute state charges (*Windsor Heights*) and would recognize standing to claim a violation of Chapter 28E (*Hawkeye Foodservice*). Therefore, the AOS has failed to identify any supportive authority for its newest argument that would permit the Court

to grant the requested relief – to declare that the Pool is a 28E entity when the Pool denies that it is.

Mr. Smith testified unreservedly that the Pool is not a 28E entity and that he has never regarded it as such. (TRANS. p. 60, APP. p. 407). This testimony is supported by a long-time marketer and promoter of the Pool who provided sworn testimony that over his many years working with the Pool, he was never instructed or otherwise advised the Pool was "anything other than a 670.7 entity" and, further, that he did not recall referring to or describing the Pool "as an 28E entity over all of my years of marketing". (Exhibit 1, APP. pp. 153-154). Mr. Smith has never represented the Pool as a 28E (other than inadvertently in a single instance almost 20 years ago when signing an Application for Registration of Mark) and does not believe the Pool's marketing team or anyone else associated with the administration of the Pool has ever referred to it as a 28E. (TRANS. p. 61. APP. p. 408). To the contrary, Mr. Smith testified to specifically discussing this subject when he was looking into the Pool while working for the City of Clinton:

Q: Was there ever discussion that [the Pool] was a 28E?

A: There was a discussion that [the Pool] was not a 28E.

Q: So this was specifically discussed?

A: Yes.

(TRANS. pp. 74-75, APP. p. 407).

This testimony is supported by agreements entered into over the years between the Pool and the Iowa State Association of Counties (dated 10/29/08), the Iowa League of Cities (dated 11/17/08), and the Association of Iowa Fairs (dated 4/12/12), all of which repeatedly and consistently refer to the Pool as "a property and casualty group self-insurance program, organized pursuant to Iowa Code section 670.7". (Exhibit 13, pp. DEF-0076, DEF-0082, DEF-00168, APP. pp. 228, 234, 320).

The AOS points to no authority that states Chapter 28E is the exclusive mechanism by which public entities may contract or join together to create a risk pool. In fact, the Iowa Attorney General previously considered the exclusivity of Chapter 28E in an opinion from 1966. 1966 WL 155368 (Iowa A.G.). Iowa Code

Chapter 28E was first adopted as Chapter 83 in 1965 by House File 188. The Attorney General was asked whether a city that wanted to contract with the Army Corps of Engineers on a levee project was required to utilize the House File 188 procedures to complete this objective. In its opinion, the Attorney General concluded it did not and stated, "House File 188 is not applicable to municipal flood control projects, because municipalities have express powers elsewhere to cooperate with the Federal government in the implementation of such works." *Id.* at *4. The Attorney General further stated:

> Where express powers enable the agencies to do conjointly what they seek to do, they need not and may not invoke House File 188. House File 188 supplies generally the power of cooperation where it is not expressly granted with reference to the exercise of specific, substantive powers.

Id. at *1. Accordingly, because Iowa Code § 670.7 specifically empowers a municipality to "join and pay funds into a local government risk pool to protect the municipality against any or all liability, loss of property, or any other risk associated with the operation of the municipality," a municipality is not required to rely on Chapter 28E to accomplish these same objectives.

4. If the Pool is not a 670.7 entity, it is an unincorporated non-profit association.

In its brief, the AOS argues that Iowa Code § 670.7 does not, by itself, create a risk pool. This argument is founded solely upon the AOS' latest statutory interpretation and not on any definitive case precedent. To be clear, the operative statute, Iowa Code § 670.7, provides that municipalities "may join and pay funds into a local government risk pool to protect the municipality against any or all liability, loss of property, or any other risk associated with the operation of the municipality." Furthermore, Iowa Code § 670.7 expressly allows the municipalities to "enter into insurance agreements obligating the municipality to make payments beyond its current budget year to provide or procure the … local government risk pool." The Pool in this case was created based upon such an agreement recognized and allowed under Iowa law.

The AOS incorrectly claims the Pool can only operate as a 28E entity because there is no other possible entity by which it can operate. However, this argument has no merit because it

fails to account for or recognize evidence presented at hearing. The Pool offered documentary evidence at the September 3, 2021 hearing that provides a reasonable alternative to the AOS' argument.

Exhibit 16 is a letter dated October 23, 1987 from the Internal Revenue Service ("IRS") to the Pool. (EXHIBIT 16, DEF-pp. 195-198, APP. pp. 347-350). The primary purpose of this letter was to provide an opinion regarding whether the income of the Pool was taxable under the Internal Revenue Code. In the second paragraph of the letter, the IRS describes the Pool as "an unincorporated, non-profit association to establish and administer a group liability protection pool … as permitted pursuant to state statute." The AOS seemingly would disregard without commentary the IRS' long-ago recognition of the Pool's status because it does not support the AOS' newest argument.

Iowa Code Chapter 501B, the Revised Uniform Unincorporated Nonprofit Association Act, recognizes and authorizes this type of entity. The Code defines an unincorporated nonprofit association as:

> an unincorporated organization consisting of two or more members joined under an agreement that is oral, in a record, or implied from conduct, for one or more common, nonprofit purposes.

Iowa Code § 501B.2(8). Mr. Smith testified at the evidentiary hearing that the IRS' description of the Pool was consistent with his understanding of the Pool over the years. (TRANS. p. 84, APP. p. 411). Neither Mr. Smith nor the IRS ever advised that the Pool was or should be a 28E, as the AOS now advocates. *Id.* To the contrary, Mr. Smith has described the Pool as a Chapter 670 risk-sharing pool to its members and to Iowa lawmakers (in subcommittee meetings) without challenge or reference to 28E. (TRANS. pp. 86-87, APP. p. 410).

The district court limited its ruling on this matter to the 28E status of the Pool and correctly concluded that the AOS failed to show the Pool was a 28E entity. (Ruling, pp. 10-11, APP. pp. 423-424). While such a ruling was and is dispositive of the AOS' effort to expand its authority and jurisdiction, the Pool argued in its post-hearing brief there were additional grounds upon which the AOS' Application to Enforce Subpoena should be denied, regardless of the 28E issue. (Post-Hearing

Brief at 2-6, APP. pp. 400-404). "It is well-settled law that a prevailing party can raise an alternative ground for affirmance on appeal without filing a notice of cross-appeal, as long as the prevailing party raised the alternative ground in the district court." *Duck Creek Tire Serv., Inc. v. Goodyear Corners, L.C.,* 796 N.W.2d 886, 893 (Iowa 2011). The Pool reasserts those additional arguments in this appeal as reasons to affirm the district court's order rejecting the AOS' Application to Enforce Subpoena.

II. EVEN IF THE POOL WERE TO BE DETERMINED TO BE A "GOVERNMENTAL SUBDIVISION" UNDER CHAPTER 11, THE AOS HAS FAILED TO ESTABLISH THE NECESSARY AUTHORITY TO PERFORM A REAUDIT OF THE POOL.

The Iowa Supreme Court has held that judicial enforcement of an administrative subpoena "requires that the subpoena be (1) within the statutory authority of the agency, (2) reasonably specific, (3) not unduly burdensome and (4) reasonably relevant to the matters under investigation." *Iowa City Human Rights Comm'n v. Roadway Exp., Inc.,* 397 N.W.2d 508, 510 (Iowa 1986) (internal citations omitted).

Iowa Code Chapter 11 provides the AOS with his authority. In this case at bar, the AOS has failed to demonstrate the documents demanded in its subpoena are within the statutory authority of the AOS. Because the AOS' demand for documents is unsupported and goes beyond its statutory authority, the Application to Enforce Subpoena must be denied and the ruling of the district court should be affirmed.

Iowa law provides that "governmental subdivisions" be audited "either by the auditor of state or by certified public accountants". Iowa Code § 11.6(2)(a)(2). In fact, the Pool has been audited "[e]very year" with "no improprieties". (TRANS. pp. 80-81). Although the Pool has not filed its audit reports with the AOS because the Pool is not a "governmental subdivision" under Chapter 11, the Pool freely makes the audit reports publicly available by posting them on its website. (TRANS. p. 83, APP. p. 399). The AOS' representative admitted at the evidentiary hearing he had obtained the Pool's audit report from the Pool and saw the Pool's audit reports posted on the Pool's website. (TRANS. p. 38, APP. p. 401). Given these

circumstances, the AOS' appellate argument that the Pool's "position is not one of good faith, but instead appears calculated to delay and thwart investigation of its transactions" is unsupported and contrary to all credible evidence showing the Pool's openness and legitimate legal position, and the AOS' attribution of such a motivation to the Pool is completely inappropriate.

The AOS' subpoena is not seeking to audit the Pool – because the audit has already been completed without finding any improprieties – but instead is seeking materials for a ***reaudit***. In its Application to Enforce Subpoena, the AOS asserts "[d]ocuments called for under the January 14, 2021 subpoena are needed by the Auditor to allow that office to determine the appropriate scope of ***reaudit*** as authorized in Iowa Code section 11.6(4)." (App. to Enforce Subpoena, ¶ 58 (emphasis added), APP. p. 21). The AOS' investigator testified at hearing he had reviewed the Pool's audit and that the AOS' request here could be termed a ***reaudit***. (TRANS. p. 37). Iowa Code § 11.6(4)(a) sets forth the conditions under which the AOS

may "cause to be made a complete or partial ***reaudit*** of the financial condition and transactions of any governmental subdivision." (emphasis added). A reaudit is authorized ***only*** under three specific scenarios:

> (1) The auditor of state has probable cause to believe such action is necessary in the public interest because of a material deficiency in an audit of the governmental subdivision filed with the auditor of state or because of a substantial failure of the audit to comply with the standards and procedures established and published by the auditor of state.
>
> (2) The auditor of state receives from an elected official or employee of the governmental subdivision a written request for a complete or partial reaudit of the governmental subdivision.
>
> (3) The auditor of state receives a petition signed by at least one hundred eligible electors of the governmental subdivision requesting a complete or partial reaudit of the governmental subdivision.

Id. The AOS failed to produce any evidence meeting these requirements.

First, at the September 3, 2021 evidentiary hearing, the AOS did not present any evidence of a "material deficiency" or "substantial failure" within the Pool's existing audits. (TRANS. p. 26) (Indicating basis for reaudit was provided in Exhibit 6);

see also TRANS. p. 81, APP. p. 401). Indeed, although the AOS was aware that the Pool's prior audits were publicly available on its website and that the AOS reviewed the Pool's website to see the prior audits and the most recent financial audit, the AOS did not offer any evidence or testimony of any "material deficiency" or "substantial failure" in any of the Pool's prior audits. (TRANS. pp. 37-38, APP. p. 401). In fact, the Pool's recent audit was included in evidence at Exhibits 4 and J. Yet, the AOS did not offer any critique or criticism of the substance of this audit report at hearing.

Upon appeal, the AOS argues because the Pool did not file its prior audit(s) with AOS – instead making them publicly available on its website – there is probable cause to believe there is "a material deficiency in an audit". Brief at 44. This argument should be discarded as the lack of filing – while justified under these circumstances despite the AOS' protestation – does absolutely nothing to demonstrate any material deficiency ***in*** the audit(s) itself. Seemingly as a back-up argument, the AOS further argues upon appeal "it did not

appear the private audit addressed the propriety of the costs incurred for alleged travel to out-of-state destinations by The Pool's board." Brief at 46. However, the AOS fails to cite to or rely upon any evidentiary showings of a "material deficiency" because its investigator who testified at hearing did not support the AOS' claim. To the contrary, there was no testimony whatsoever from the AOS' investigator who had reviewed the Pool's audit that would support finding any material deficiencies in the audit. (TRANS. p. 11, APP. p. 401).

Second, the AOS admitted it has not received any written requests from an elected official or employee of the Pool requesting a reaudit.[2] (TRANS. p. 26, APP. p. 401).

Third, the AOS further admitted it has not received a petition from 100 eligible electors requesting a reaudit of the Pool. *Id.*

2 The Pool acknowledges that Mr. Cunningham separately testified at the hearing that the AOS was contacted by phone by an unnamed individual who he believed to be "a board member" of a "member county" of the Pool. Trans. pp. 41, 43. Upon appeal, the AOS argued that this individual was a board member of the Pool. Brief at 45. The Pool does not believe the AOS was contacted by a then current board member of the Pool, but may have instead been contacted by a then current board member of a county that is a member of the Pool. Trans. pp. 41, 43. Furthermore, this unnamed person was not requesting a reaudit. Trans. p. 43.

Accordingly, the AOS' evidence fails to meet any of the three required statutory prerequisites necessary to establish the AOS' underlying authority to perform a reaudit in this case. Because the subject subpoena was not issued "within the statutory authority" of the AOS, the subpoena cannot be judicially enforced. *Iowa City Human Rights Comm'n v. Roadway Exp., Inc.,* 397 N.W.2d at 510.

III. THE COURT SHOULD NOT ENFORCE THE SUBPOENA BECAUSE THE ONLY UNFULFILLED ITEMS ARE NOT REASONABLY RELEVANT TO THE MATTERS UNDER INVESTIGATION.

The Iowa Supreme Court rightfully requires that a subpoena be "reasonably relevant to the matters under investigation." *Id.* It became clear at the September 3, 2021 evidentiary hearing that several of the AOS' demands for materials within its subpoena have no relevance or any bearing whatsoever upon the subject of the AOS' requested (though unauthorized) reaudit. Therefore, the AOS' requests for admittedly irrelevant materials cannot be enforced.

Mr. Cunningham, the AOS' only witness and representative testifying at the September 3, 2021 evidentiary

hearing, described the basis for AOS' subpoena. (TRANS. p. 12, APP. p. 402). In fact, it was Mr. Cunningham who issued the AOS' subpoenas involving the Pool. (TRANS. p. 22, APP. p. 402). Mr. Cunningham testified at hearing:

> **Q: What was the reason for the subpoena to [the Pool] shown in Exhibit B?**
>
> **A: We were first notified of news articles. And after reviewing those news articles regarding what some considered excessive travel, out-of-state travel, you know, concerning the use of the funds, we were asked to review the information and decide whether it was something that we should pursue as part of the engagement. In looking through the news article, it was determined through discussions with other staff in the office, Auditor Sand, that we would issue a subpoena for this information.**

(TRANS. pp. 12-13, APP. pp. 402-403). However, the subpoena at issue seeks materials that have nothing to do with the out-of-state travel that was the subject of the referenced news article(s) or the AOS' requested reaudit. Specifically, the AOS' subpoena seeks settlement agreements and claims materials held by the Pool involving claims asserted against its members that have nothing whatsoever to do with the AOS' requested

reaudit. These are the only materials that the Pool consistently refused to provide to the AOS. (TRANS. pp. 35-36, APP. p. 403). When asked regarding this subject at hearing, Mr. Cunningham struggled to explain the relevance of these materials before admitting there is none. He testified as follows:

> **Q: What would those settlement agreements have to do with [the Pool's] board members' travel costs?**
>
> **A: They – if there were any travel costs. I would not expect board members to go to meetings or settlements, but if they had to go to a court hearing or something like that, there may be travel costs involved.**
>
> **Q: Now, did the news article you were discussing earlier have anything to do with settlements of claims against members of [the Pool]?**
>
> **A: No.**
>
> **Q: Did it have anything to do with travel to settlements of claims of members of [the Pool]?**
>
> **A: No.**
>
> **Q: What did the travel pertain to? Conferences?**
>
> **A: Conferences and retreats. Conferences and meetings – annual meetings, I believe.**

Q: So conferences; things like seminars?

A: Yes.

Q: They weren't settlement conferences?

A: No.

Q: So would the auditor's request for members' liability settlement agreements have anything to do whatsoever with those news articles that were the basis for the investigation?

A: No.

(TRANS. pp. 29-30, APP. pp. 403-404). This testimony established beyond doubt that the AOS' request for claims materials and settlements involving the Pool's members had nothing whatsoever to do with the AOS' requested reaudit pertaining to travel costs associated with conferences, retreats or seminars. In fact, Mr. Cunningham acknowledged there is nobody in the AOS' office who even has any background in administering liability claims, which would be necessary to conduct a meaningful review of such materials. (TRANS. p. 36, APP. p. 404). He further acknowledged that when the AOS has led an audit or reaudit, a report will be issued that is freely

available to the public, with the AOS solely determining what information will be included within the report. (TRANS. pp. 42-43). Mr. Cunningham admitted the public release of the information pertaining to liability claims could be harmful to the Pool's members. *Id.*

Because the claims handling materials and settlement agreements are not "reasonably related to a matter under investigation", the AOS' Application to Enforce Subpoena should be denied as it relates to these types of documents. In fact, the AOS would not have the authority to pursue any documents that are not tied to the only disclosed reason for investigation (i.e., "an Associated Press news article in September" referencing travel to conferences). (TRANS. pp. 24-25, Exhibit 6, APP. p. 194).

CONCLUSION

The ruling of the trial court must be affirmed.

REQUEST TO BE HEARD ORALLY

The Pool requests to be heard orally upon submission of this appeal.

/s/ Andrew Tice
Andrew Tice AT0007968

/s/ Kristine Stone
Kristine Stone AT0008828
AHLERS & COONEY, P.C.
100 Court Avenue, Suite 600
Des Moines, Iowa 50309
Telephone: (515) 243-7611
Facsimile: (515) 243-2149
atice@ahlerslaw.com
kstone@ahlerslaw.com

ATTORNEYS FOR APPELLEES

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE
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1. This brief complies with the type-volume limitation of Iowa R. App. p. 6.903(1)(g)(1) because:

> This brief contains 6,425 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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/s/ Kristine Stone

Kristine Stone AT0008828
AHLERS & COONEY, P.C.
100 Court Avenue, Suite 600
Des Moines, Iowa 50309
Telephone: (515) 243-7611
Facsimile: (515) 243-2149
E-mail: kstone@ahlerslaw.com

ATTORNEY FOR APPELLEE

CERTIFICATE OF FILING

The undersigned hereby certifies that the Final Brief of the Appellee was electronically filed on the 7th day of April, 2022, with the Clerk of the Iowa Supreme Court, 1111 East Court Avenue, Des Moines, Iowa 50319.

/s/ Andrew Tice
Andrew Tice AT0007968

/s/ Kristine Stone
Kristine Stone AT0008828
AHLERS & COONEY, P.C.
100 Court Avenue, Suite 600
Des Moines, Iowa 50309
Telephone: (515) 243-7611
Facsimile: (515) 243-2149
E-mail: atice@ahlerslaw.com
kstone@ahlerslaw.com

ATTORNEYS FOR APPELLEE

CERTIFICATE OF SERVICE

It is hereby certified that on the 7th day of April, 2022, the undersigned party, or a person acting on its behalf, served the within Final Brief of Appellee on all the other parties to this appeal by e-mailing a copy thereof to the following counsel for said parties:

Matthew S. Rousseau
Assistant Attorney General
800 Lincoln Way
Ames, IA 50010
Attorney for Plaintiff-Appellant

in compliance with the provisions of Rule 6.901, Iowa Rules of Appellate Procedure. In addition, an electronic copy was filed and served via EDMS on March 4, 2022.

/s/ Kristine Stone
Kristine Stone AT0008828

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