Section C

Godfrey Revisted: Winning Constitutional Tort Damages

Roxanne Conlin

Roxanne Conlin & Associates, PC
3721 SW 61st St., Ste. C
Des Moines, IA 50321-2418
Roxlaw@aol.com

Paige Fiedler

Fiedler Law Firm, PLC
8831 Windsor Parkway
Johnston, IA 50131
paige@employmentlawiowa.com

GODFREY REVISITED: WINNING CONSTITUTIONAL TORT DAMAGES

ROXANNE BARTON CONLIN

ROXANNE CONLIN & ASSOCIATES, P.C.

3721 SW 61ST STREET, SUITE C

DES MOINES, IA 50321

ROXANNE@ROXANNECONLINLAW.COM

ROXANNECONLINLAW.COM

PAIGE FIEDLER

FIEDLER LAW FIRM, P.L.C.

8831 WINDSOR PKWY

JOHNSTON, IA 50131

PAIGE@EMPLOYMENTLAWIOWA.COM

EMPLOYMENTLAWIOWA.COM

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 13
Essential Elements Substantive Due Process Deprivation – Property Right

Iowa Law guarantees employees of public entities, like the State, a right to substantive due process. Plaintiff claims Defendants deprived him of his right to substantive due process by reducing his salary because of his political affiliation and for other arbitrary reasons. Defendants deny that claim. To recover damages on his claim of a substantive due process violation with respect to his employment, Plaintiff must prove that:

1. Plaintiff had a constitutionally protected property right in continuing his employment as the Iowa Workers' Compensation Commissioner at his established salary, based on the factors set out in Iowa statutory law;

2. Defendants, acting under color of law, deprived Plaintiff of his constitutionally protected property right in continuing his employment as the Iowa Workers' Compensation Commissioner at his established salary, based on the factors set out in Iowa statutory law without due process of law; and,

3. Defendants' conduct which deprived Plaintiff of his constitutionally protected property right was clearly arbitrary and unreasonable and had no substantial relation to the public health, safety, morals, or general welfare.

If you find that Plaintiff has proven each of the above elements, your verdict on Plaintiff's substantive due process claim must be for Plaintiff. If you find that Plaintiff has not proven each of the above elements with respect to the Defendants, then your verdict on Plaintiff's substantive due process claim must be for the Defendants.

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 14
Essential Elements Procedural Due Process Deprivation – Property Right

Iowa Law guarantees employees of public entities, like the State, a right to procedural due process. Plaintiff claims Defendants deprived him of his right to procedural due process by reducing his salary without providing him the procedural protections the law requires. Defendants deny that claim. To recover damages on his procedural due process claim with respect to his employment, the Plaintiff must prove that:

1. Plaintiff had a constitutionally protected property right in continuing his employment position as the Iowa Workers' Compensation Commissioner at his established salary, based on the factors set out in Iowa statutory law;

2. Defendants, acting under color of law, deprived Plaintiff of his constitutionally protected property right in continuing his employment position as the Iowa Workers' Compensation Commissioner at his established salary, based on the factors set out in Iowa statutory law; and,

3. Plaintiff was denied proper notice and/or a meaningful opportunity to be heard before his salary was reduced.

If you find that Plaintiff has proven each of the above elements, your verdict on the claim of procedural due process deprivation must be for Plaintiff. If you find that Plaintiff has not proven each of the above elements with respect to the Defendants, then your verdict on the claim of procedural due process deprivation must be for the Defendants.

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 15
Essential Elements Substantive Due Process Deprivation – Liberty Interest

Iowa Law guarantees employees of public entities, like the State, a right to substantive due process. Plaintiff claims Defendants deprived him of his right to substantive due process by publicly and falsely stating that his salary was reduced because courts stated he was biased against employers and that him salary was lowered based on his performance of his assigned duties and other similar stigmatizing statements. Defendants deny that claim. To recover damages on his substantive due process claim based on a liberty interest, Plaintiff must prove that:

1. Plaintiff had a constitutionally protected liberty interest in his reputation as it related to his employment as the Iowa Workers' Compensation Commissioner;

2. Defendants, acting under color of law, injured Godfrey's reputation as it related to his employment as the Iowa Workers' Compensation Commissioner by publishing false and stigmatizing statements, which Plaintiff denied, about the reason for reducing Plaintiff's salary without due process of law;

3. Defendants' publication of such false and stigmatizing statements seriously damaged Godfrey's standing and associations in the community; and

4. Defendants' conduct which injured Godfrey's constitutionally protected liberty interest was clearly arbitrary and unreasonable and had no substantial relation to the public health, safety, morals, or general welfare.

If you find that Plaintiff has proven each of the above elements, your verdict on the claim of substantive due process deprivation must be for Plaintiff. If you find that Plaintiff has not proven each of the above elements with respect to the Defendants, then your verdict on the claim of substantive due process deprivation must be for the Defendants.

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 16
Essential Elements Procedural Due Process Deprivation – Liberty Interest

Iowa Law guarantees employees of public entities, like the State, a right to procedural due process. Plaintiff claims Defendants deprived him of his right to procedural due process by publicly and falsely stating that his salary was reduced because courts stated he was biased against employers and that his salary was lowered based on his performance of his assigned duties and other similar stigmatizing statements without providing his any opportunity to refute those allegations or otherwise clear his name. Defendants deny that claim. To recover damages on his claim of a Procedural Due Process violation with respect to a liberty interest, the Plaintiff, Christopher Godfrey, must prove that:

1. Plaintiff had a constitutionally protected liberty interest in his reputation as it related to his employment as the Iowa Workers' Compensation Commissioner;

2. Plaintiffs, acting under color of law, injured Godfrey's reputation as it related to his employment as the Iowa Workers' Compensation Commissioner by publishing false and stigmatizing statements, which Plaintiff denied, about the reason for reducing Plaintiff's salary;

3. Defendant's publication of such false and stigmatizing statements seriously damaged Plaintiff's standing and associations in the community;

4. Defendant's conduct which injured Plaintiff's constitutionally protected liberty interest was clearly arbitrary and unreasonable and had no substantial relation to the public health, safety, morals, or general welfare; and

5. Plaintiff was denied proper notice and/or a meaningful opportunity to be heard.

If you find that Plaintiff has proven each of the above elements, your verdict on the claim of procedural due process deprivation must be for Plaintiff. If you find that Plaintiff has not proven each of the above elements with respect to the Defendants, then your verdict on the claim of procedural due process deprivation must be for the Defendants.

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 25
Procedural Due Process – Defined

The Procedural Due Process Clause contained in the Iowa Constitution, Article 1, Section 9, prohibits the State from depriving a person of property without due process of law.

The Procedural Due Process Clause contained in the Iowa Constitutional, Article 1, Section 9, ensures that anyone who suffers a deprivation of a constitutionally protected property interest the opportunity to be heard at a meaningful time and in a meaningful manner.

Authority

IOWA CONST. art. 1, § 9
Jones v. University of Iowa, 836 N.W.2d 127, 145-46 (Iowa 2013)
State v. Hernandez-Lopez, 639 N.W. 2d 226, 237 (Iowa 2002)
Winegar v. Des Moines Indep. Cmty. Sch. Dist., 20 F.3d 895, 899-900 (8th Cir. 1994)
King v. State, 818 N.W.2d 1, 33 n. 25 (Iowa 2012)
Swipies v. Kofka, 419 F.3d 709, 715 (8th Cir. 2005)
Mathews v. Eldridge, 424 U.S. 319, 333 (1976)

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 26
Substantive Due Process--Defined

The Substantive Due Process Clause contained in the Iowa Constitution, Article 1, Section 9, prohibits the State from interfering with a person's rights that are implicit in the concept of ordered liberty, that is, a person's right to engage in any of the common occupations of life, including employment.

Authority

IOWA CONST. art. 1, § 9
State v. Hernandez-Lopez, 639 N.W. 2d 226, 237 (Iowa 2002)
Bennett c. City of Redfield, 446 N.W.2d 467, 471 (Iowa 1989)
Meyer v. Nebraska, 262 U.S. 390, 399 (1923)

Finally, Defendants argue that this case is akin to cases examining the separation of powers citing to *Des Moines Register & Tribune Co. v. Dwyer*, 542 N.W.2d 491, 495 (Iowa 1996). The issue in *Dwyer* was whether Senate phone records were part of the public record available under the freedom of information act without litigation. *Id.* at 494. It involved challenges to the validity of a statute – an apportionment statute. *Id.* at 187 Likewise, the quote relied on by Defendants from *John v. U.S.* demonstrates that Defendants' argument is not on point with the issues in this case. Plaintiff Godfrey is not attempting to address a controversy "committed for resolution to the halls of Congress or the confines of the Executive Branch." (Def. Brf. 51- quoting *John v. U.S.*, 77 Fed. Cl. 788, 825 (Fed. Cl. 2007)).

Plaintiff Godfrey's case does not ask the Court to rule that the Governor's discretionary authority to issue a line time veto is unconstitutional. Rather, Plaintiff assert Defendants violated his civil rights when they discriminated and retaliated against him for declining to resign. One form of retaliation used by Defendant Branstad was to issue a line item veto that singled out an appropriation approved by the legislature that would have directly aided Plaintiff in the performance of his job duties.

F. A governor-elect and a governor may make decisions about a political appointee based on political party affiliation or differences in policymaking views as it relates to non-quasi-judicial duties but may not make decisions about a political appointee based on partisan political interests or differences in policymaking views relating to quasi-judicial duties in contested case decisions.

Plaintiff is not required to show he was the only gay man in the Branstad administration to prove that he was the victim of sexual orientation discrimination. Likewise, Plaintiff does not have to prove he was the only Democrat in the Branstad administration to prove that his political party affiliation and his unwillingness to violate his quasi-judicial ethical obligations in an effort

E-FILED 2019 SEP 03 7:28 PM JASPER - CLERK OF DISTRICT COURT

to help Defendant Branstad reach his Republican Party campaign promises made him a target for unfair treatment.

Branstad repeatedly testified that he did not believe Plaintiff would do enough to support a Republican agenda and was critical of him for an alleged "anti-employer bias." As explained by Branstad's Chief of Staff, Jeff Boeyink,

> The governor wanted to build around himself a leadership team that would help him reach his goals, one of which was the creation of 200,000 new jobs, but the governor wanted of Mr. Godfrey that he be fair and even handed. The governor had concerns about his anti-employer bias developed through the process that we've talked about and so –

(Tr. 6/5/2019, p. 110)

In other words, Plaintiff was not behaving like a good Republican. He had not, in their view, adopted the Party line by showing favoritism to business interests.

Defendants argue that Plaintiff, as an agency head and political appointee, was a policymaker and therefore Defendants could take adverse employment actions against him for "First Amendment activities if they hold confidential or policymaking positions for which political loyalty is necessary to effective job performance." (Def. Brief p. 40, citing *Shockency v. Ramsey City.*, 493 F.3d 941, 950 (8th Cir. 2007)). Just as it was not on point in their Motion for Summary Judgment, it remains irrelevant to the present case.

In *Shockency*, a plaintiff (a veteran deputy sheriff) was transferred to an undesirable position after the defendant (Sheriff Fletcher) found out Moore planned to run for office against him. *Id.* at 945. The issue in Shockency was plaintiff's first amendment rights. The issue in the present case is not whether Plaintiff's first amendment rights were violated. It is whether he was discriminated against. If what Defendants are attempting to communicate is that Branstad had a first amendment right to take action against Plaintiff, the authority offered does not support it. It

appears they rely on the case for the assertion that it was alright for the Governor to punish Godfrey for not exhibiting enough political loyalty. (Def. Brief, p. 40)

Defendants argue that if Plaintiff had decided contested cases favoring employers, that would cause the Worker's Compensation insurance rates to fall and make the State a more competitive work environment. (TR 6/5/171, p. 170-71)

With regard to Defendants' argument that Plaintiff Godfrey is a policy maker, that is partially true. The Division of Workers' Compensation has two sections. IAC 876-1.1. The first is compliance which includes a number of administrative duties, some that may be policy making in nature. *Id.* The second is adjudication which

> **determines, by adjudicative means, the rights and liabilities of parties in a disputed claim by conducting hearings and rendering decisions; approving settlements in accordance with the statutes; and conducting appeals within the division.**

Id. (emphasis added).

The nature of the Workers' Compensation Commissioner position in deciding individual contested cases is quasi-judicial. As such, it must be entirely free of political influences or pressure to comply with the agenda of a specific "team." Iowa Admin. Code 481-15.1.[7] Administrative judicial officers "shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the administrative judiciary and shall avoid impropriety and the appearance of impropriety." (See also, *Office of Citizens' Aide/Ombudsman v. Edwards*, 825 N.W.2d 8, 20 (Iowa 2012). - Administrative Law Judges act

[7] The law requires administrative judicial officers to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the administrative judiciary and shall avoid impropriety and the appearance of impropriety." Iowa Admin. Code 481-15.1(10A).

E-FILED 2019 SEP 03 7:28 PM JASPER - CLERK OF DISTRICT COURT

in a quasi-judicial capacity and are generally "immune from compulsory discovery into the mental processes behind their decision making.")

Assuming arguendo that contested case decisions could influence Worker's Compensation insurance rates, the impact a contested case might have on insurance rates is not a consideration Plaintiff or any of the deputy commissioners could use based on their quasi-judicial status and ethical obligations to remain impartial. (Tr. 6/12/2019, p. 226; TR 6/25/2019, p. 172-73; TR 6/27/2019, pp. 21-22)

The next case cited by Defendants in support of their contention that Defendant Branstad could take adverse employment action based on partisan interests involved a community television station director who believed he was terminated for his coverage of the mayoral race. *Rosenberg v. City of Everett*, 328 F.3d 12, 17 (1st Cir. 2003). In that case, the plaintiff did not occupy a quasi-judicial role and did not have an appointment for a term-of-years secured by statute. *Id.*

Defendants next quote a United States Supreme Court case which stated, "A government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (1990)). This quote was included in a survey of prior cases on the subject and reflected a position that the U.S. Supreme Court rejected. "We therefore determine that promotions, transfers, and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees." *Id.* at 75.

Furthermore, repeating an incorrect statement does not make it correct. Setting aside for a moment that it would be improper to evaluate Plaintiff in a manner that invaded his quasi-

judicial independence, Defendants offered no evidence that Plaintiff was "anti-employer" in his contested case decisions. No one disputes that the Worker's Compensation Commissioner has no direct ability to create jobs. Likewise, decisions in individual Workers' Compensation cases do not impact insurance rates.

Dr. John Burton testified that the Workers' Compensation Commissioner's decisions in contested cases has little to do with Workers' Compensation insurance rates. (TR 6/25/2019, pp. 37-42 – explaining that the "cost of a workers' compensation program to a large extent depend upon what . . . the statute say given injuries are worth.") Defendants did nothing to investigate what impact individual contested case decisions have on Worker's Compensation insurance rates. (TR 6/6/2019, 57-59, 84-85) Defendant Branstad was unaware that Iowa's Worker's Compensation insurance rates dropped from $1.52 per $100,000 payroll dollars in 2006 to $1.42 in 2010. (Tr. 6/14/2019, pp. 74-75)

As further evidence that this focus on insurance rates was improper pretext for the adverse employment action was the fact that businesses displeasure with Worker's Compensation insurance rates was a perennial complaint of businesses and yet was used to criticize Plaintiff but not his predecessors or successor. Senator Gronstal's testified that businesses complain about insurance rates every year. (TR. 6/13/2019, p. 186) He added that businesses complained a lot more about property taxes than Worker's Compensation insurance rates. (Tr. 6/13/2019, p. 187)

Current Workers' Compensation Commissioner Joe Cortese, a former Workers' Compensation defense attorney appointed by Defendant Branstad after Plaintiff's resignation, testified that he did not care about the Worker's Compensation insurance rates. (TR 6/27/2019, pp. 24, 40) No one ever bothered him about insurance rates, and he paid no attention to them.

E-FILED 2019 SEP 03 7:28 PM JASPER - CLERK OF DISTRICT COURT

(TR 6/27/2019, pp. 21, 40 – Conlin - "You don't care what the insurance rates are, do you?" Cortese – "I really don't.") Defendant Branstad never asked Commissioner Cortese about his political affiliation or whether he would decide cases in a certain way. (TR 6/27/2019)

Despite what Iowa statutes and regulations state, Defendants offered a last burst of cases in an effort to categorize Plaintiff's duties as policymaking (appropriate grounds in Defendants' view for demanding political loyalty) as opposed to adjudicative.

> In two companion cases, the Supreme Court held that, while public employers cannot condition employment on an individual's political affiliation, an employee's First Amendment right of political association leaves room for employers to dismiss employees in positions where political loyalty is a valid job qualification. *See Elrod v. Burns*, 427 U.S. 347, 372, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Branti v. Finkel*, 445 U.S. 507, 516, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). And so emerged the so-called *Elrod-Branti* exception to political patronage dismissals. . . .
>
> The overarching inquiry under the *Elrod-Branti* exception is whether the public employer can show that "party affiliation is an appropriate requirement for the effective performance of the public office involved." [citations omitted] "[T]his could be either because the job involves the making of policy and thus the exercise of political judgment or the provision of political advice to the elected superior, or because it is a job (such as speechwriting) that gives the holder access to his political superiors' confidential, politically sensitive thoughts." [citations omitted]
>
> Our focus, then, is on whether the job in question entails substantial policymaking responsibility, meaningful discretion to implement the policy goals of elected officials, or a need to maintain the confidentiality essential to enabling robust deliberations entailing disagreement and incorporating political objectives. [citations omitted]

Bogart v. Vermillion Cty., Ill., 909 F.3d 210, 213–14 (7th Cir. 2018).

The cases cited by Defendants are not on point because these cases were brought under 42 United States Code section 1983 alleging violation of the First Amendment and the Equal Protection Clause. *Id.* at 212. The present case is based on due process violations.

Furthermore, this argument runs contrary to Defendants' admissions throughout this litigation. The cases cited by Defendants all involve termination of employment based on

political differences. Defendants have admitted in this case that the only way they could terminate Plaintiff would be to remove him for cause and that such cause did not exist. Iowa Code § 66.26; (*See also*, TR 6/11/2019, pp. 179-81 – "I didn't think it was a close question either.") Therefore, Defendants knew that the Elrod-Branti exception did not apply to Plaintiff. This is another failed post-hoc rationalizations for retaliatory actions taken without forethought.

Furthermore, there is no indication that the positions held by the plaintiffs in the cases cited by Defendants involved: a) quasi-judicial or judicial duties; b) senate confirmation; c) statutory terms of years; d) prohibition on political activity; or e) statutes severely restricting the terms for removal. *Bogart*, 909 F.3d 210 – financial resources director; *Davis v. Ockomon*, 668 F.3d 473 (7th Cir. 2012) – senior humane officer; *McGuirin Ehrhard v. Connolly*, 867 F.2d 92 (1st Cir. 1989) – secretary of state; *Roman Melendez v. Inclan*, 826 F.2d 130 (1st Cir. 1987) – regional director of administrative services.

In the present case, the Workers' Compensation Commissioner's quasi-judicial duties made up a dominant part of his position with corresponding ethical obligations. Iowa Code § 86.17; IAC 876-1.1. The Commissioner was appointed by the Governor and approved by the Senate for a "fixed" six-year term. Iowa Code § 86.1; Iowa Code § 69.19. The Commissioner was prohibited from participating in political activity. Iowa Code § 86.4. The Commissioner could only be removed from office by a majority vote of the executive council for cause.

The following causes are identified in the statute.

1. Habitual or willful neglect of duty.
2. Any disability preventing a proper discharge of the duties of the office.
3. **Gross partiality.**
4. Oppression.
5. Extortion.
6. Corruption.

E-FILED 2019 SEP 03 7:28 PM JASPER - CLERK OF DISTRICT COURT

7. Willful misconduct or maladministration in office.
8. Conviction of felony.
9. A failure to produce and fully account for all public funds and property in the officer's hands at any inspection or settlement.
10. Becoming ineligible to hold the office.

Iowa Code § 66.26 (emphasis added).

If Defendants had really believed that Plaintiff's decisions were not "fair and even-handed" or decidedly "anti-employer," they could have removed him for "gross partiality."

Furthermore, Joe Cortese testified that the duties of the Workers' Compensation Commissioner, consistent with the definition set out in Iowa Administrative Code section 876-1.1, are adjudicative (deciding appeals) and administrative. (TR 6/27/2019, p. 28-29) The adjudicative portion of the job is performed in a quasi-judicial capacity. (TR 6/27/2019, p. 22)

Plaintiff's position did not involve significant policymaking authority.[8] His duties were largely quasi-judicial in nature. Governor Branstad violated Plaintiff's constitutional due process rights when, in retaliation for his refusal to resign his fixed Senate-appointed term of office, he slashed his salary from the top of the pay scale to the very lowest.

[8] Defendants randomly threw in without citation the allegation that Vilsack and Culver asked fixed-term appointees to voluntarily resign. Governor Tom Vilsack testified that he did not ask the Branstad-appointed Workers' Compensation Commissioner Iris Post to resign. (TR 6/10/2019, p. 30) Transition director for Governor Culver, Charles Krogmeier, testified that resignations were not sought from appointees with set terms. (TR 6/13/2019, p. 130) This comparison is inapt anyway because no prior governor punished an employee by slashing their salary for refusing to resign. The stray comments Defendants keep throwing in their arguments are red herrings meant to create distraction from the inherent weakness of the underlying arguments.

G. Differences in policymaking views may not legitimately influence a governor's decisions regarding a nonelected political appointee and can support a constitutional tort claim for deprivation of a property interest where the criticism of the appointee invades the quasi-judicial duties in contested cases.

Defendants begin this brief point arguing that the fact that Worker's Compensation Commissioners serve as a quasi-judicial officer is just a "false narrative" generated by Plaintiff. (Def. Brief, pp. 43-57) It is astounding to see Defendants attack the Court's prior rulings. Glaringly absent from Defendants fourteen-page argument is the testimony of a single witness willing to state that the Worker's Compensation Commissioner is not a quasi-judicial officer.

Before reaching the argument, it is worth noting that Defendants make this argument in desperation to hide the fact that the ONLY rationale Defendants have ever provided for slashing Plaintiff's pay was that Defendant Branstad thought the contested case decisions issued by the agency were "anti-employer." (Tr. 6/5/2019, p. 110) They have no fall back excuse. If they cannot rely on criticism of decisions coming out of the agency to justify slashing Plaintiff's salary, there was no legitimate reason for cutting his salary. The pretext collapses on itself.

The waste of time this argument presents is magnified with the realization that even if it were found that Defendants were permitted to engage in an examination of Plaintiff's contested case decisions, the fact is that they did not. Defendant Findley's alleged review of Worker's Compensation cases would be a joke if it had not had such a profoundly negative impact on Plaintiff's life. If Defendants actually did perform a review in the manner that they testified to, it must be categorized as extreme incompetence, mean-spirited, or both. It was not conducted with due care. See also, *infra* Brief Point I.L.5.

Returning to Defendants rehashing of the quasi-judicial nature of the Worker's Compensation Commissioner's position, Defendants renew arguments well known to the Court.

E-FILED 2019 SEP 03 7:28 PM JASPER - CLERK OF DISTRICT COURT

Defendants begin their argument stating the Defendant Branstad did not attempt to "force" Plaintiff to decide agency decisions in favor of employers. (Def. Brief, p. 43) Plaintiff has never made that allegation. It is well established that no one in the Branstad administration spoke to Plaintiff between December 29, 2010 and July 11, 2011, when his salary was slashed.

Defendants planted the issue of Plaintiff's contested case decisions in the heart of this case when they offered it up as the only rationale for the adverse employment actions taken against him. Given the opportunity to attribute his displeasure with Plaintiff's performance to administrative duties, Defendant Branstad doubled down.

> Q. (Ms. Fiedler) During the time that you talked to Brenna Findley about [Plaintiff's performance], do you recall whether or not she had any papers or documents or books in her hand?
>
> A. (Defendant Branstad) No. I just remember that I had had probably a couple meetings with her, and **she briefed me about some of the court decisions** that -- and some of the language that had been used by the judges that were very critical of the performance of the commissioner.
>
> Q. And that's the court decisions that we just got through talking about?
>
> A. We talked about those, yes.
>
> Q. Did you ask any questions of anybody about Chris Godfrey's performance as it related to the administrative and management functions of his job?
>
> A. I don't recall that I received a lot of complaints about that. **The complaints were really about fairness and the treatment of the employers with these contested cases.**
>
> Q. **Did you reach any judgments or conclusions about Mr. Godfrey's performance as it related to the administrative or management functions of his job?**
>
> A. **I didn't have a lot of specifics on that particular area. That was not an area that we'd heard a lot of complaints about.** But the most important area was the responsibility for fair and even handedness in making the decisions, and that's the biggest and most important part of being the workers' comp commissioner.

(TR 6/14/2019, pp. 117-18) (Emphasis added.)

In one respect, Defendants' puzzlement over why Plaintiff presented contested case decisions to the jury is warranted. As a quasi-judicial officer, Defendants had no right to evaluate

his performance on that basis. However, not knowing whether the jury would fully appreciate the significance of quasi-judicial autonomy, Plaintiff convincingly showed the jury various contested case decisions to demonstrate how well-reasoned and fair his decisions were.

Defendants argue that political affiliation had "Absolutely Nothing!" to do with contested cases and accuse Plaintiff of conflating "political affiliation with policymaking." (Def. Brief, p. 44) It was Defendants' perception that Plaintiff was not "on the team" and advancing Defendant Branstad's campaign goals that made Plaintiff's political status relevant.

> Q. Do you believe that, by refusing your request to resign, Mr. Godfrey was putting his own interests above the interests of the people of Iowa?
>
> A. The people of Iowa had chosen a new governor, and **I had run on a platform focused on jobs**, raising family incomes, restoring fiscal responsibility, and I thought it was important that I have a team that supported that.

(TR 6/14/2019, p. 43 – emphasis added.)

Furthermore, Plaintiff's due process claim does not depend on a specific burden regarding the significance of the partisan motivations behind Defendants' adverse employment actions. Due process claims turn on whether the administrative procedures provided are constitutionally sufficient. *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S.Ct. 893, 902-03 (1976).

Defendants violation of due process was proven in part by showing that Defendants did not utilize the criteria in the salary setting statute to assess Plaintiff Godfrey's performance: (1) the experience of the individual in the position; (2) changes in the duties of the position, (3) the incumbent's performance of assigned duties; and (4) subordinates' salaries. 2008 Iowa Acts 1191 § 13.

Defendants take issue with the Court's pre-trial ruling which held:

> It is the Court's determination that Plaintiff Godfrey acted in a quasi-judicial capacity when he conducted de novo reviews of contested workers' compensation cases and issued appeal decisions pursuant to Iowa Code chapters 85, 85A, 85B, 86, 87, and 17A. Iowa cases that have defined "quasi-judicial" make it clear that an agency's powers must be delegated from the legislature. The Workers' Compensation Commissioner's powers are specifically delegated by the legislature; the Commissioner is prevented from deciding cases in ignorance of the law.

See *Godfrey v. State - Ruling on Defendants' Motion for Summary Judgment and Plaintiff's Motion for Advance Ruling on Question of Law*,[9] File No. LACL124195, p. 9 (Iowa Dist. Ct. for Polk County filed May 9, 2019).

Defendants argue that Plaintiff filed the Motion for Advance Ruling on Question of Law which sought to have the Court rule that Plaintiff "was effectively immune from performance evaluation by the Governor regarding the agency's final decisions."[10] (Def. Brief, p. 44) This is inaccurate. Plaintiff sought to have performance evaluation standards defined in a manner that took into account his ethical obligations as a quasi-judicial officer.

Defendants could have evaluated all portions of Plaintiff's job performance just as they would evaluate any employee's job performance. But Defendants fixated on contested case decisions. In order to find that his job performance was lacking with regard to contested case decisions, Defendants would be required to prove he had violated his ethical duties as a quasi-judicial officer or showed gross partiality in the contested cases. Iowa Code § 66.26. They would be required to show that he was deciding cases in ignorance of the law. With that as a measure,

[9] Defendants decision to re-argue this settled issue which of course must be answered is nothing more than a waste of resources for Plaintiff and the Court. Given that they are making this argument on the backs of the taxpayers, the abuse is even more objectionable.

[10] Although it is out of place here, Defendants also take issue with the Court's determination that the Governor's "discretion" with regard to setting Plaintiff's salary is not unlimited. (Def. Brief, p. 46) As set forth in Section I.D.1 *supra*, the statutory language states that the Governor "shall" consider the factors identified in the statute: the experience of the individual in the position, changes in the duties of the position, the incumbent's performance of assigned duties, and subordinates' salaries. 2008 Iowa Acts 1191 § 13. The fact that the statute grants the Governor discretion to consider additional factors does not negate his obligation to consider the factors explicitly identified in the statute, which he did not do.

E-FILED 2019 SEP 03 7:28 PM JASPER - CLERK OF DISTRICT COURT

Defendants were robbed of their ability to use his contested case decisions in evaluating Plaintiff because they wanted him to make decisions that favored employers in ignorance of the law.

The point should not be lost that Defendants offered no objective, measurable evidence that Plaintiff exercised any bias in favor of claimants.[11] Defendants instead made a failed attempt to show that in a handful of cases he did not favor employers.

Therefore, the Court's pre-trial ruling was well-reasoned and supported by a substantial body of existing case law. See Ruling on Defendants' Motion for Summary Judgment and Plaintiff's Motion for Advance Ruling on Question of Law, pp. 51-65, filed May 9, 2019 – Iowa Dist. Ct. for Polk County.)

Nonetheless, Defendants again argue that the Iowa Code of Administrative Judicial Conduct does not apply to the Worker's Compensation Commissioner because "the Code does not apply to persons who participate only in the making of the final decision without serving as presiding officer" at the hearing. (Def. Brief, p. 46-47, citing Iowa Admin Code r. 481-15.5(3)). Defendants correctly quoted the Administrative Code but left off the key provision. "This Code may nevertheless provide useful ethical guidance for a person participating in the making of a final decision in a contested case." Iowa Admin. Code 481-15.5(3)(c). It is a bit astounding that defense counsel argue this point. If they represented clients before the agency, they would legitimately have every expectation that the Worker's Compensation Commissioner would act impartially in deciding contested cases.

[11] Plaintiff offered evidence of the lack of anti-employer bias by entering into evidence cases in which he reversed cases in favor of the employer, affirmed cases that favored the employer, and reduced awards to claimants. (See, Ex. 373A-C; Ex. 374A-D; Ex. 375A-J)

E-FILED 2019 SEP 03 7:28 PM JASPER - CLERK OF DISTRICT COURT

Defendants again raise the argument presented in their resistance to the Motion for Advance Ruling on Question of Law that the IAPA and Iowa Code section 86.24 confers "policymaking authority" on the Commissioner in "issuing final decisions." (Def. Brief, p. 46)

Defendants argue that the under the IAPA "an agency can create policy generally or on a case-by-case basis based on individual facts and circumstances, including a contested case proceeding. (Def. Brief, pp. 47-48) Defendants do not follow this assertion with citation to authority. To buttress their argument, Defendants throw in references to scholar Arthur E. Bonfield and the Legislative Services Agency's Rulemaking Guide. (Id.) These sources simply do not support the point Defendants attempt to attribute to them.

The "case-by-case policymaking" referred to in the Rulemaking Guide simply states that individual rights and duties are determined "based on a specific fact situation." *Rulemaking Guide*, p. 3. While such decisions possess precedential value, this is only true in case involving "**the same or a very similar fact situation.**" Legislative Services Agency's *Legislative Guide – Rulemaking Guide* (hereafter "*Rulemaking Guide*"), p. 3. In other words, the Worker's Compensation Commissioner is bound by legal precedent. Neither Prof. Bonfield's article, nor the *Rulemaking Guide* define "quasi-judicial" duties and what role they may play in "case-by-case policymaking" or the distinctions that exist between deciding factual issues and interpreting the law.

Defendants next quote at length from a report former Worker's Commissioner Michael Trier. (Def. Brief pp. 48-49) Michael Trier's report is not legal precedent.

Defendants examine the *Rizvic* case at a cellular level to argue that it "illustrates the degree of discretion Godfrey had in issuing final appeal decisions." (Def. Brief, pp. 49-54) In five pages of their brief devoted to this case, they dive into every detail of the agency decisions,

the Courts' decisions, and emails between Plaintiff and Deputy Commissioner Walshire. While Defendants are quite concerned with some of the details, at the end of the day, the District Court and Court of Appeals remanded the agency Appeal Decision (issued by order of delegation by Larry Walshire) and on appeal the second time, the District Court remanded the agency Remand Decision (issued by Plaintiff). While it is true that Chief Judge Huppert found that the Appeal Decision issued by Deputy Walshire[12] lacked objectivity, the Court of Appeals walked that back. See, *Beef Products Inc. v. Rizvic*, 806 N.W.2d 294 *6 (Table) (Iowa Ct. App. 2011) ("Although we do not question the commissioner's objectivity, we do not find support for the commissioner's determination of permanency, and we affirm the district court's reversal as to that portion of his decision.") While Deputy Walshire and Plaintiff discussed the case after the remand, other deputies testified that it was not uncommon for coworkers at the agency to privately express concern about a higher court ruling. (TR 6/27/2019, p. 188)

In the final analysis and contrary to Defendants' aim, the *Rizvic* case demonstrates the very real limitations on the Commissioner when the reviewing courts perceive the agency is not following precedent or is not properly applying the law to the facts of a case.

[12] As they did at trial, Defendants argument attempts to characterize Deputy Walshire as a rogue agent and then make Plaintiff proxy for his alleged misdeeds. This may have been more effective if Deputy Walshire was more of a miscreant than evidence allowed. This is how the people who worked with Deputy Walshire described him.

- "Larry was a very hard-working person. I mean, he was like a worker bee. He worked very, very hard." (TR 6/27/2019, p. 189 – Dep. McGovern)
- He was a "[v]ery hard worker." (TR 6/27/2019, p. 52 – Com'r Cortese)
- "Deputy Walshire was extremely knowledgeable about workers' compensation law. He had worked for many commissioners and had a very deep knowledge of workers' compensation law." (TR 6/20/2019, p. 5 – Deputy Elliott)
- Larry turned around decisions as fast or faster than anyone else." (TR 6/26/2019, p. 27 – Dep. Grell)

E-FILED 2019 SEP 03 7:28 PM JASPER - CLERK OF DISTRICT COURT

Defendants then pivot back to quoting a report by Trier. (Def. Brief, pp. 54-55) It did not evolve into legal precedent in the intervening paragraphs. And then Defendants arrive at some cases they suggest supports their view that the Worker's Compensation Commissioner is a policymaker. The first is a case involving a plumbing company that brought suit against the Natural Resources Council relating for denial of a permit. *Young Plumbing and Heating Co. v. Iowa Natural Resources Council*, 276 N.W. 2d 377, 379 (Iowa 1979). This case does nothing to advance understanding of the issue regarding the quasi-judicial duties of the Workers' Compensation Commissioner. Instead it addressed disputes existing in unrelated agencies that - while bound by the IAPA - have nothing in common with the structure established to adjudicate Workers' Compensation claims. The quotation from the case addresses situations where there is not adequate guidance regarding whether an issue must be resolved by rulemaking or a contested case. *Id.* at 382. That is not the situation in the present case. There is abundant statutory guidance in Iowa Code chapters 85, 85A, 85B, 86, 87 and 17A, IAC 876-1.1, and a substantial amount of case law that has already resolved this question for issues relating to contested cases of Workers' Compensation claims.

Defendants argue that the "Iowa Supreme Court acknowledged the policymaking role of an agency head in *Iowa Farm Bureau Federation v. Environmental Protection Com*'n, 850 N.W.2d 403, 407 (Iowa 2010)." (Def. Brief, p. 55-56) Though they are appointed by the Senate, the EPC is a commission of the Department of Natural Resources ("DNR") and consists of a panel of nine citizens who provide policy oversight over Iowa's environmental protection efforts." https://www.iowadnr.gov/About-DNR/Boards-Commissions/Environmental-Protection-EPC The EPC meets monthly to make rules governing Iowa's environment. *Iowa Farm Bureau*

Federation, 850 N.W.2d at 406-07. The Farm Bureau case was about "quasi-**legislative**" action taken by the EPC. *Id.* at 420 (emphasis added). That case is not on point with the present case.

More on point with the present case is what happens when an individual disagrees with a decision of the DNR. In that case, the individual has a right to appeal the DNR's decision, similar to an individual's right to appeal a Worker's Compensation Arbitration Decision. Iowa Admin. Code 561-7.4(1). Contested cases before the DNR are heard by an administrative law judge employed by the Department of Inspections and Appeals. Iowa Admin. Code 561-7.7. Administrative law judges for the Department of Inspections and Appeals are bound by the Iowa Code of Administrative Judicial Conduct. Iowa Code 10A.801.7(d); Iowa Code 17A.11(1).

Not one past or present employed as a Worker's Compensation Commissioner or Deputy Commissioner testified to the contrary. Iris Post, a former Worker's Compensation Commissioner who had been appointed by Defendant Branstad, testified thus:

Q. (BY MS. CONLIN) Would you tell the deputies, the chief deputies, what decision to reach in a particular case, and the answer to that is either yes, I would, or no, I would not?

A. (BY MS. POST) I'm understanding. No.

Q. All right. Would you interfere in their fact finding outside of the appeal process?

A. No.

Q. You were a quasi-judicial officer; correct?

A. Yes.

Q. Your deputies were quasi-judicial officers?

A. Yes.

Q. They are bound by the code of administrative law judges; correct?

A. Yes.

Q. And so are you?

A. Yes.

(TR 7/9/2019, p. 30)

E-FILED 2019 SEP 03 7:28 PM JASPER - CLERK OF DISTRICT COURT

Branstad-appointed current Workers' Compensation Commissioner, Joe Cortese, testified:

Q. (BY MS. CONLIN) All right. And you're a quasi-judicial officer; correct?

A. I believe so.

* * *

Q. As a quasi-judicial officer, your duty is to be fair and even handed at all times; correct?

A. Yes.

Q. And the failure to do that would be a serious attack on your character; correct?

A. The accusation would be?

Q. Yeah.

A. Yes.

(TR 6/27/2019, p. 22-23)

The Court properly determined that "Plaintiff Godfrey acted in a quasi-judicial capacity when he conducted de novo reviews of contested workers' compensation cases and issued appeal decisions pursuant to Iowa Code chapters 85, 85A, 85B, 86, 87, and 17A" *See* Ruling on Defendants' Motion for Summary Judgment and Plaintiff's Motion for Advance Ruling on Question of Law, p. 9, filed May 9, 2019 – Iowa Dist. Ct. for Polk County.

H. The ICRA is applicable to statutory appointees and one "adverse action" that Plaintiff experienced was the July 11, 2011 salary reduction along with a series of other acts with a "cumulative impact" constituting a continuing violation.

Defendants repeat the argument presented in the Motion for Summary Judgment that the adverse employment actions were not sufficiently adverse to constitute discrimination under the ICRA. (Def. Brief, p. 57) Defendants position is that Plaintiff should be required to silo off each discriminatory event and have it considered in isolation from the environment in which it took

L. As a matter of law, Plaintiff's constitutional tort claim is supported by substantial evidence.

1. There is substantial evidence that partisan political interests caused the July 2011 resignation request and salary reduction because Branstad's criticism of Plaintiff's performance was based on his view that Godfrey should ignore his ethical obligations and decide quasi-judicial contested cases to advance the Republican Party's campaign promises.

Defendants use this brief point to reiterate many of the same points raised in Brief Point I.F above. Defendants argue their view on this subpoint without any legal authority. They first assert that because a limited number of Democrats were employed by the Branstad administration a finding of discrimination on the basis of political affiliation would be impossible. (Def. Brief, p. 80) Just as Branstad boasted of having three gay friends and was found to have discriminated against Plaintiff, so too his administration had some Democrats[23] and yet Defendant Branstad's actions were motivated by partisan purposes. In fact, Defendants attempt to use partisan goals as a defense against discrimination. The issue was not as much with Plaintiff's party affiliation as a Democrat as it has to do with Defendants' identity as a Republicans and their expectation that Plaintiff comply with their political vision of what the Division of Worker's Compensation could do, even when doing so would require Plaintiff to violate his ethical obligation to decide cases impartially.

Defendants attempt to inoculate against Plaintiff's assertion by arguing that Defendant Branstad's policymaking views offer him special protections. (Def. Brief, p. 77 – "To the extent that Plaintiff contends his policymaking views and inclinations as a claimant's attorney influenced the Governor's decision, that subject pertains to policymaking rather than political

[23] Defendants are also incorrect about some of their categorizations. Beth Townsend testified that she was selected by Defendant Branstad because she was "a Republican attorney who did employment law." (TR 7/8/2019, p. 123 – "As they said I was the only one they knew.")

E-FILED 2019 SEP 03 7:28 PM JASPER - CLERK OF DISTRICT COURT

party affiliation . . .") Defendants miss the point that their attack on Godfrey's job performance was partisan because it was based on their political agenda – as enunciated during the campaign[24] – and their erroneous belief that it was perfectly permissible to inject politics into a quasi-judicial process. Defendants' took adverse employment action against Plaintiff when he was perceived (correctly) as unwilling to violate his quasi-judicial obligations to comply with Defendants' partisan political agenda.

Defendants argue that Plaintiff's assertion that Defendant Branstad thought it proper to use extrajudicial considerations to decide individual worker's compensation cases is without support. (Def. Brief p. 78) They then pivot to unintentionally prove the position they deny. Defense proclaims that Defendant Branstad thought Plaintiff was not treating employers in a fair and evenhanded manner.[25] (Id.) (emphasis added). He was concerned about an extremely specific form of bias (allegedly against his Republican business constituents), and not about the impartiality of contested case decisions.

> Q. (Ms. Fiedler) Did you believe that Chris Godfrey was making decisions so as to benefit workers and their lawyers to the detriment of Iowa businesses?
>
> A. (Gov. Branstad) This is what I was hearing from a number of Iowa businesses.

[24] It was Defendant Branstad's goal to create 200,000 new jobs. (TR 6/5/2019, p. 110) He believed rising workers' compensation insurance rates were deterring companies from locating or growing their businesses in Iowa. (TR 6/14/2019, pp. 187-88)

[25] It is quite astounding that defense counsel continue to argue that the Commissioner is a policymaker when deciding contested cases and that is an appropriate basis for Branstad to oust him so he could "build his own team." One would hope they would never make such an argument about a Supreme Court justice, that they would have enough respect for our judicial system to know that justices could not be replaced based on the political will of the executive or legislature. Yet that is precisely what they are arguing about the Worker's Compensation Commissioner's even though he exercises quasi-judicial duties and decides the rights and liabilities of individuals. The fundamental flaw in their argument is that they simply refuse to see that litigants in contested Workers' Compensation cases at the administrative level are entitled to adjudicators who act impartially based on the facts of the case and existing legal precedent.

(TR 6/14/2019, p. 134)

Jeff Boeyink testified that Governor believed that Godfrey "was biased against employers, and that was hurting the ability of some of these businesses to compete." (TR 6/5/2019, p. 105) But as has been discussed often in the course of this case, there is no list of people who made these alleged complaints. (Id.) The Governor never met with injured workers to discuss their view of the efficacy or fairness of the workers' compensation process. Defendant Branstad did not know how many workers' compensation cases went to hearing. (TR 6/14/2019, p. 30) Defendant Findley's "review" of cases that Defendant Branstad allegedly heard about on the campaign trail was grossly lopsided - a simple exercise of confirmation bias. (TR 6/14/2019, pp. 84-87; TR 6/11/2019, pp. 97-99)

Defendant Branstad had no concern for whether Plaintiff was impartial because he claims he did not know that the Worker's Compensation Commissioner served as a quasi-judicial officer with associated ethical obligations.

Q. Did you know that there are rules of ethics that apply to people who serve a quasi-judicial function in the executive branch?
A. No.
Q. Okay. And I take it you didn't know what those were either?
A. No.
Q. You didn't know they existed?
A. No.

(TR 6/14/2019, pp. 135-36)

Defendants final argument is that Defendant Branstad's appointment of an employment law "plaintiffs" attorney to head the Iowa Civil Rights Commission. (Def. Brief p. 79) Just as with the "but I have gay friends" defense is not effective at proving acceptance of gays, so too the "but I hired a plaintiffs' attorney" does not prove that Defendants' actions were not based on

E-FILED 2019 SEP 03 7:28 PM JASPER - CLERK OF DISTRICT COURT

Plaintiff's political affiliation and values. First, Beth Townsend was a Republican. (TR. 7/8/2019, p. 123) Second, her law experience was not entirely employment law. It included insurance defense, criminal law, and family law. (TR 7/8/2019, p. 121)

Defendants have offered no reasonable basis upon which one could actually claim Plaintiff was biased. Rather Defendants' Republican agenda of making the State more hospitable for businesses was never tempered with consideration of the Division of Workers' Compensation's obligation to decide individual contested cases impartially. Defendant Branstad was not interested in Plaintiff's actual performance, he wanted Plaintiff to issue decisions that were biased in favor of employers.

2. Plaintiff maintained a cognizable "property interest" in a salary level set in compliance with the statutory guidance and his right to due process.

Defendants allege that the process of reducing Plaintiff's salary cannot be considered in evaluating whether his property rights were violated. They admit that the Commissioner's appointment to a term of years creates a property interest. (Def. Brief pp. 80-81) They admit that the law's requirement that a salary be established within the range provided by 2008 Iowa Acts 1191 creates a property interest. (Id.)

Defendants again cite to federal law in support of this position when there is applicable Iowa precedent. The Iowa Supreme Court stated that "Public employees who can be discharged only for cause have a constitutionally protected property interest in their tenure and cannot be fired without due process." *Simonson v. Iowa State Univ.*, 603 N.W.2d 557, 561 (Iowa 1999).

Defendants project their view that a property interest must be a "thing" onto the *Bennett* case by quoting the Court's statement that a property interest "[is] created and [its] dimensions are defined by existing rules or understandings that stem from an independent source such as state law." (Def. Brief, p. 80, citing *Bennett v. City of Redfield*, 446 N.W.2d 467, 472 (Iowa

1989) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548, 561 (1972)). But *Bennett* does not provide support for Defendants' characterization of a property right as a "thing."

> In the context of public employee discharges, the Court looks to state law to determine whether a public employee has a property interest in continued employment. See, e.g., *Bishop v. Wood*, 426 U.S. 341, 344, 96 S.Ct. 2074, 2077, 48 L.Ed.2d 684, 690 (1976). If a property interest in continued employment exists, then the employee is entitled to a pretermination hearing that comports with the requirements of due process.

Id. (citations omitted).

Defendants attempt to advance a theory that "termination" is a "thing" protected by due process, but due process does not attach to a "salary reduction" because it is not a "thing." It is a strained argument and a distinction that Iowa courts have not recognized. In reality, both salary reductions and terminations are adverse employment actions that impact an employee's property interest and warrant due process.

> [A] state statute or policy can create a constitutionally protected property interest, first, when it contains particularized substantive standards that guide a decision maker and, second, when it limits the decision maker's discretion by using mandatory language (both requirements are necessary).

Dunham v. Wadley, 195 F.3d 1007, 1009 (8th Cir. 1999).

This was the law relied on by this Court in the Ruling on Summary Judgment and Defendants acknowledge these principles are true and applicable. (Def. Brief p. 81) But they criticize the Court's ruling on this issue for performing "no analysis of the scope or application of this boilerplate language . . ." (Def. Brief, pp. 81-82) On this point, Defendants are simply wrong.

The Court identified the State statute that gave rise to Plaintiff's property interest. Pursuant to statute:

E-FILED 2019 SEP 03 7:28 PM JASPER - CLERK OF DISTRICT COURT

> The governor shall establish a salary for appointed nonelected persons in the executive branch of state government holding a position enumerated in the section of this division of this Act that addresses the salary ranges of state officers within the range provided, by considering, among other items, the experience of the individual in the position, changes in the duties of the position, the incumbent's performance of assigned duties, and subordinates' salaries.

Godfrey v. State, No. LACL124195 Ruling on the Motion for Summary Judgment, p. 28-29 (Iowa Polk Co. Dist. Ct., May 9, 2019) (citing Iowa Code § 86.1).

The statute "contains particularized substantive standards that guide a decision maker":

- the experience of the individual in the position
- changes in the duties of the position
- the incumbent's performance of assigned duties
- and subordinates' salaries.

Dunham, 195 F.3d at 1009; Iowa Code § 86.1.

The statute likewise contains "limits [on] the decision maker's discretion by using mandatory language" when it states that the governor 'shall' establish a salary for appointed nonelected person . . . by considering 'among other things,' the four performance measures set forth above. *Id.*

Defendants take issue with the Court's ruling on the final jury Instruction No. 28 which stated:

Iowa law provides:

> The governor shall establish a salary for appointed nonelected persons in the executive branch of state government . . . within the range provided, by considering, among other items, the experience of the individual in the position, changes in the duties of the position, the incumbent's performance of assigned duties, and subordinates' salaries.

The Workers' Compensation Commissioner is one of the appointed nonelected persons addressed by this law. In 2011, the statutorily set salary range provided for the Workers' Compensation Commissioner was $73,250 - $112,070.

> In setting salaries pursuant to this provision, the Governor is obligated to exercise discretion **based upon the factors set forth in the law**, and not based on strictly partisan political purposes.

Godfrey v. State, No. LACL121599 Jury Instruction No. 28 (Iowa Jasper Co. Dist. Ct., July 12, 2019) (citing Iowa Code § 86.1) (emphasis added).

Defendants argue that identifying during trial that this statute provides a constitutionally protected property interest was an unrequested "change" in the Court's position that showed bias. This allegation is easily dispelled by reviewing the Motion for Summary Judgment which states that "These statutes [2008 Iowa Acts 1191 § 13 and Iowa Code § 86.1] are the independent source of the property and liberty rights Godfrey contends were unconstitutionally taken from him." *Godfrey v. State*, No. LACL124195 Ruling on the Motion for Summary Judgment, p. 29. The Court did not state that Plaintiff contended these statutes gave rise to property rights. The Court stated that Plaintiff had property rights pursuant to the statutes that Plaintiff contended Defendants violated. *Id.*

Furthermore, while Defendants cry bias over Jury Instruction No. 28, they seem to forget that the Court determined during trial that an instruction on Plaintiff's due process liberty interest claim would not be submitted to the jury. See, *Godfrey v. State*, No. LACL121599 Jury Instruction No. 28 (Iowa Jasper Co. Dist. Ct., July 12, 2019); See also, TR 7/11/2019, pp. 90-92. Defendants' claim of bias is not met by reality.

Defendants argue that the language that "places limits" on the governor's discretion in 2008 Iowa Acts 1191 § 13 are insufficient in defining "substantive standards" to evaluate the "relevant criteria". (Def. Brief, pp. 82-83 – citing *McGuire v. Independent School District No. 833*, 863 F.2d 1030, 1035 (8th Cir. 2017)). That case is not on point because the school coach did not have a property interest because the statute gave the coach "a 'mere subjective expectancy'

E-FILED 2019 SEP 03 7:28 PM JASPER - CLERK OF DISTRICT COURT

of continued employment." *Id.* It was an at-will employment situation.[26] *Id.* The coach did not have appointments for terms of years as Plaintiff did in the present case.

Furthermore, this argument might gain traction in a case where a governor sought to evaluate the relevant criteria and a question existed about whether the evaluation was sufficient. In the present case, Defendants made no effort to evaluate Plaintiff based on the relevant factors. Defendant Boeyink admitted that Defendant Branstad made the decision to reduce Plaintiff's salary without consideration of his experience, whether there had been any changes in his duties, or review Plaintiff's subordinates' salaries. (Tr. 6/6/2019 pp. 31-33) Defendants failed to consider three of the four mandatory factors. Defendants' alleged "review" of his performance was woefully inadequate and tainted by partisan goals.

A grant of discretion in a statute does not give the governor authority to ignore the law. The criteria in the statute is sufficient to establish a property interest and that reduction of Plaintiff's salary was arbitrary and a violation of his due process rights. 2008 Iowa Acts 1191 § 13.

---

[26] The Court expanded on its reasoning thus:

> Here, Subdivision 2 of Minnesota Statute § 122A.33 gives the School Board unfettered discretion to refuse to renew a coach's contract. See Minn. Stat. Ann. § 122A.33, subd. 2 ("[A] person employed as a head varsity coach has an annual contract as a coach that the school board may or may not renew as the board sees fit."). Assuming it is substantive, the 2013 amendment only prohibited the School Board from basing its renewal decision solely on "the existence of parent complaints." See id., subd. 3. This single limit on the reasons for non-renewal still "leav[es] the particular substantive outcome in each case to the sound discretion of" the School Board. Forrester v. Bass, 397 F.3d 1047, 1056 (8th Cir. 2005). Even if McGuire could establish beyond doubt that the School Board's decision not to renew his contract was based solely on the existence of parent complaints, **the School Board could decline to renew his contract anyway, for a different reason, or no reason at all.**

Id. (emphasis added).

3. Given Plaintiff's property interest in his salary, he did not receive the due process to which he was entitled.

Defendants argue that Plaintiff was given all the process he was due in the December 29, 2010, meeting. It defies logic to assert that a Plaintiff can receive due process before the action (performance evaluation) that caused the due process violation was contemplated. Defendants argument asks the Court to find that any conversation between an employer and employee, no matter the timing, provides the employee sufficient due process even if the conversation occurred before the employer was considering the action that resulted in a violation of the employee's due process rights. This cannot be the law.

"If a property interest in continued employment exists, then the employee is entitled to a [pre-adverse action] hearing that comports with the requirements of due process." *Bennett*, 446 N.W.2d at 472, citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494, 503–04 (1983). "'[T]he root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'" *Loudermill*, 470 U.S. at 542, quoting *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971) (emphasis in original).

> It is well settled the extent and nature of the hearing required for due process varies according to the needs and circumstances of a given case. But is clear that some [pre-adverse action] notice is required . . . as a component of due process. And it is now well settled that some opportunity must be accorded to protest and present proof as to why a property right should not be terminated.

Auxier v. Woodward State Hospital-School, 266 N.W.2d 139, 142 (Iowa 1978).

Furthermore, "where a required notice (or hearing) right is not given by statute it ' * * * is derived in a proper case from common-law principles embodied in the constitutional guaranty of due process of law. * * *.'" *Id.* (quoting 2 Am.Jur.2d Administrative Law, § 398 at p. 203).

E-FILED 2019 SEP 03 7:28 PM JASPER - CLERK OF DISTRICT COURT

There are three key dates regarding Plaintiff's due process claim:

December 29, 2010	Plaintiff met with Defendants Branstad, Boeyink, and Findley to discuss the Governor's request for Plaintiff's resignation;
July 5, 2011	The purported meeting wherein Defendants Branstad, Boeyink, and Findley met to discuss Plaintiff's performance and the decision was made to cut his salary; and,
July 11, 2011	The day Defendants Boeyink and Findley met with Plaintiff to request his resignation and, if the resignation was not received, to cut his salary by 35 percent.

December 29, 2010

On December 29, 2010, Plaintiff attended a meeting with Defendants Branstad, Jeffrey Boeyink, and Kim Reynolds. (Ex. 60) The Governor asked for Plaintiff's resignation but took no action when Plaintiff declined to offer his resignation. (Tr. 6/5/2019, pp. 145-46, 161-62) Defendant Branstad testified that the issues raised in the December 29, 2010, meeting included: employee choice of physician, electronic filing system, and alleged complaints from unnamed Iowa employers. (TR 6/14/2019, pp. 49-50, 60) At the time of the December 29, 2010 meeting, Defendant Branstad did not know about statements in judicial opinions he allegedly relied on July 5, 2011. (TR 6/14/2019, p. 56)

July 5, 2011

Defendants did not begin the "review" of Plaintiff's performance that led to the salary reduction until at least June of 2011. (TR 6/11/2019, p. 179) It may not have begun until July 2011. (TR 6/6/2019, p. 27-28; TR 6/14/2019, p. 84) Defendant Branstad asked Defendant Findley to "do some background" on the comments he heard from businesses.[27] (TR 7/5/2019, p.

[27] Defendant Boeyink claimed that there were complaints received about Plaintiff Godfrey between December 29, 2010 and July 11, 2011 though he did not have any idea how many. (TR 6/6/2019, p. 27) None of those alleged complaints received between December 29, 2010 and July 11, 2011 were discussed until the July 5, 2011 meeting between Defendants Branstad, Boeyink, and Findley. (TR 6/6/2019, pp. 27-28 – "Not until then.")

85 - Depo. Desig. pp. 83:18 to 84:24; TR 6/14/2019, pp. 56) Defendant Branstad decision to cut Plaintiff's salary was "based on the information that Brenna Findley supplied to me about statements that were made by district court judges and Court of Appeals judges."[28] (TR 7/5/2019, p. 85 - Depo. Desig. pp. 93:9 to 93:24; TR 6/6/2019, p. 52) The review by Defendant Findley consisted of six judicial opinions. (TR 7/5/2019, p. 86 - Depo. Desig. pp. 355:13 to 355:24)

July 11, 2011

Defendants had no contact with Plaintiff between December 29, 2010 and July 11, 2011. (TR 6/6/2019, pp. 25, 57) Plaintiff was never given an opportunity to address the six cases Defendant Branstad allegedly relied on when making the decision about Plaintiff's employment. (TR 6/6/2019, pp. 49-51; TR 7/5/2019, p. 86, Depo. Desig. pp. 355:13 to 355:24) Defendants Findley and Boeyink both testified that there was nothing that Plaintiff could have said at the July 11, 2011 meeting to alter the outcome of the meeting to avoid a salary reduction. (Tr. 6/5/2019, p. 146; TR 6/6/2019, pp. 61-63; TR 6/11/2019, p. 212)

The timeline of events clearly demonstrates that the alleged basis for slashing Plaintiff's salary did not come into existence until July 5, 2011. Yet Defendants argue that Plaintiff received due process in the meeting that occurred on December 29, 2010. Defendants do not explain how Plaintiff could have responded to the six cases that formed the basis of the adverse employment action before Defendants themselves were aware of the cases. In truth, Plaintiff had absolutely "no opportunity to be heard at a meaningful time and in a meaningful manner." *Jones*, 836 N.W.2d at 145. Plaintiff did not receive any of the due process to which he was entitled.

[28] Defendants' review of Plaintiff's performance was limited to the cases Defendant Findley allegedly reviewed and did not include investigation of complaints made by John Gilliland or Mike Ralston on December 29, 2010. (TR 6/6/2019, pp. 58-59 – "No, there was no [investigation], other than the case review.")

E-FILED 2019 SEP 03 7:28 PM JASPER - CLERK OF DISTRICT COURT

4. Plaintiff's claim for violation of his due process rights based on a "property interest" in his salary is supported by existing law.

Defendants argue that Iowa courts have not taken a definitive position on whether public employment is a property interest entitled to substantive due process. (Def. Brief, p. 91) This is inaccurate. In this very case, the Iowa Supreme Court, while not addressing the merits of Plaintiff's claim, authorized him to proceed with his substantive due process claim. *Godfrey v. State ("Godfrey II")*, 898 N.W.2d 844, 885-86 (Iowa 2017).

Godfrey II was not the first time the Iowa Supreme Court has addressed a public employee's right to substantive due process. In *Lee v. Giangreco*, a teacher for Iowa School for the Deaf sued the superintendent of schools alleging gender-based discrimination. 490 N.W.2d 814, 816 (Iowa 1992). The Iowa Supreme Court held that the trial court did not err when it instructed the jury that plaintiff's right to substantive due process was violated if she was terminated without good cause. *Id.* at 818. Likewise, the trial court did not err in refusing to grant defendants motion for judgment notwithstanding the verdict on plaintiff's substantive due process claim. *Id.*

Relying on an unpublished case, Defendants urge the Court to rule that absent actions by government employees that would "shock the conscience" Plaintiff's substantive due process rights based on such a property interest fail. (Def. Brief, pp. 91-93 – citing *Al-Jurf v. Scott-Conner*,[29] 801 N.W.2d 33 (Table) 2011 WL 1584366 (Iowa Ct. App. 2011)). Existing Iowa Supreme Court precedent does not impose the "shock the conscience test."

[29] While this case does not provide controlling legal precedent, it can also be easily distinguished factually. In *Al-Jurf*, formal complaints were filed against the plaintiff and administrative hearings regarding the complaints were held. *Id.* at *1. Plaintiff complained that defendants documented more issues than they should have. *Id.* In the present case, Defendants actions in cutting his salary by 35 percent without warning and without cause would shock the conscience of any reasonable jury.

In *Giangreco*, "[a]mong the instructions given on [plaintiff's] substantive due process claim, the court told the jury that '[a] decision is arbitrary or capricious if it is done without good cause.'" *Giangreco*, 490 N.W.2d at 818. Defense in that case argued that plaintiff's claim failed as a matter of law because the termination was driven by economic forces such that the "good cause" standard was met. *Id.* The Court did not agree.

> It is true that "just cause" for termination of a teacher's contract may turn on budgetary constraints and declining enrollments which force school administrators to choose between otherwise "faultless" teachers. [citations omitted] That is not to say, however, that such reductions for "cause" are necessarily free from arbitrary decision-making. Thus in *In re Waterloo Community School District*, 338 N.W.2d 153 (Iowa 1983), we rejected a school board's refusal to explain specific staff reductions just because they were not fault oriented. **We held that school administrators may be called upon to articulate an objective basis for the selection**, specifically for the purpose of verifying that the decision was **based on rational and legitimate criteria**.

Id.

The substantive due process questions submitted to the jury in *Giangreco* were:

> Q. Do you find that plaintiff was given written or oral notice of the decision to terminate her employment before the decision was made? A. No.
>
> Q. Do you find the plaintiff was given the opportunity to present her position in regard to the decision to terminate her employment before the decision was made? A. No.

Id. at 818.

The *Giangreco* Court found no inadequacy in the jury instruction or the questions on the verdict form. *Id.*

In the present case, the substantive due process instruction was phrased:

> Your verdict must be for Plaintiff and against Defendants on Plaintiff's claim he was deprived of a constitutionally protected property interest in continuing his annual salary at the level it was at when Defendant Branstad took office as Governor of the State of Iowa if Plaintiff has proven each of the following elements by a preponderance of the evidence:

E-FILED 2019 SEP 03 7:28 PM JASPER - CLERK OF DISTRICT COURT

> 1. Defendants reduced Plaintiff's salary on a basis other than as allowed by law, as explained in Instruction No. 28, above; and
>
> 2. **Defendants' decision to reduce Plaintiff's salary was clearly arbitrary and unreasonable and had no substantial relation to the public health, safety, morals or general welfare.**
>
> 3. The Defendants' decision to reduce Plaintiff's salary was the cause of damages to the Plaintiff.
>
> If you find that Plaintiff has proved each of the above elements you will be asked to answer a special interrogatory as to whether the Plaintiff was given a meaningful opportunity to respond to the proposed salary reduction prior to the reduction (explained in Instruction No. 33). If you find that Plaintiff has not proved each of the above elements, then your verdict on the claim of deprivation of a constitutionally protected property interest without due process must be for Defendants.

See, *Godfrey v. State*, No. LACL121599 Jury Instruction No. 31 (Iowa Jasper Co. Dist. Ct., July 12, 2019) (emphasis added).

The legal standard used in this case and articulated in paragraph number two is arguably higher that would have been required by the *Giangreco* Court but was likewise drawn from earlier Iowa Supreme Court precedent. See, *Blumenthal Inv. Trusts v. City of West Des Moines*, 636 N.W.2d 255, 263-64 (Iowa 2001).[30]

In the present case, Defendants were required to articulate an objective basis for the drastic reduction in Plaintiff's salary based on rational and legitimate criteria. *Giangreco*, 490 N.W.2d at 818. They failed to do so. The jury's verdict that Defendants violated Plaintiff's substantive due process rights was based on appropriate legal standards and supported by substantial evidence.

---

[30] [A] substantive due process claim is based on the premise that the interference with property rights was " 'clearly arbitrary and unreasonable,' " in addition to " 'having no substantial relation to the public health, safety, morals, or a general welfare.' *Id.*

5. As a matter of law, Defendants are not entitled to qualified immunity because they did not exercise due care.

Defendants argue that the Supreme Court recently held that the Iowa Municipal Tort Claims Act ("IMTCA") is the exclusive remedy for constitutional tort claims against municipalities. (Def. Brief, pp. 93-95)

The history of this issue as it pertains to the current case is that while the Iowa Supreme court held that Plaintiff Godfrey's due process claims were self-executing under Iowa Constitution Article I, section 9, the Court left open the question whether Defendants were entitled to qualified immunity. *Id.* at 879.

The Court revisited this issue and articulated the standard to determine whether a state employee is entitled to the protections of qualified immunity.

> A defendant who pleads and proves as an affirmative defense that he or she exercised all due care to conform with the requirements of the law is entitled to qualified immunity on an individual's claim for damages for violation of article I, sections 1 and 8 of the Iowa Constitution.

Baldwin v. City of Estherville (*Baldwin I*) 915 N.W.2d 259, 260-61 (Iowa 2018).

The Iowa Code requires Defendants to exercise due care.

> Any claim based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion be abused.

Iowa Code § 684A.1 (2017)(emphasis added).

In *Baldwin I*, the Court determined that "qualified immunity should be shaped by the historical Iowa common law as appreciated by our framers and the principles discussed in Restatement (Second) of Torts section 874A." *Id.* at 280.

> This means due care as the benchmark. Proof of negligence, i.e., lack of due care, was required for comparable claims at common law at the time of adoption of Iowa's Constitution. [ ] And it is still the basic tort standard today. [ ]

E-FILED 2019 SEP 03 7:28 PM JASPER - CLERK OF DISTRICT COURT

> Because the question is one of immunity, the burden of proof should be on the defendant. [ ] Accordingly, to be entitled to qualified immunity a defendant must plead and prove as an affirmative defense that she or he exercised all due care to comply with the law.

Id. (citations omitted).

In *Baldwin II*, in answer to certified questions from the United States District Court for the Northern District of Iowa, the Iowa Supreme Court held that the "due care" exemption under the IMTCA may provide a city qualified immunity. *Baldwin v. City of Estherville* (*Baldwin II*[31]) 929 N.W.2d 691 (Iowa 2019). The *Baldwin II* decision is more measured in its impact than Defendants suggest.

The Court considered whether a City may "assert qualified immunity to a claim for damages for violation of the Iowa Constitution based on its officers' exercise of 'all due care.'" *Id.* at 695. The Court concluded that "the answer to certified question number 1 is that the due care exemption under section 670.4(1)(c) could provide the City immunity." *Id.* at 698 (emphasis added).

Since Defendants in the present matter did not exercise all due care, the differentiation between *Baldwin I* and *Baldwin II* has no bearing on this case. Jury Instruction Number 34 appropriately captured the "all due care" standard. The jury found that Defendants Branstad and Findley did not exercise due care.

---

[31] The *Baldwin* case has a complex procedural history. For ease of reading, Plaintiff followed Defendants' lead in referring to *Baldwin v. City of Estherville*, 915 N.W.2d 259, 260-61 (Iowa 2018) as *Baldwin I*, and *Baldwin v. City of Estherville*, 929 N.W.2d 691 (Iowa 2019) *Baldwin II*. It should be noted that the Iowa Supreme court refers to the 2018 Baldwin case at 915 N.W.2d 259 as "Baldwin II." *Baldwin v. City of Estherville*, 929 N.W.2d at 694. This mention is just to prevent potential confusion regarding the decision being referenced.

6. Defendants are not entitled to discretionary function immunity.

Defendants return to their earlier argument that Defendants were performing a discretionary function when they set Plaintiff's salary to the lowest level in the identified salary range and now argue that this entitles them to immunity pursuant to Iowa Code § 669.14(1). (Def. Brief p. 95-98) Defendants have the burden of establishing their right to the statute's protection. *Walker v. State*, 801 N.W.2d 548, 555 (Iowa 2011). To prove that they are immune from liability based on the "discretionary function" exception, Defendants must prove that their judgements were based on considerations of public policy. *Id.* at 561.

Defendants must prove that: [1] "the action [was] a matter of choice for the acting employee"; and [2] the judgment was of the kind the exception was designed to protect. *Berkovitz v. United States*, 486 U.S. 531, 536, 108 S.Ct. 1954, 1958, 100 L.Ed.2d 531 (1988). "[T]he discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment." *Id.* at 537.

Defendants again argue that Defendants were permitted to act randomly and without forewarning when dropping Plaintiff's salary from the highest level in the permissible range to the very lowest. (Def. Brief, p. 96) Of course, this is not true.

As set forth above, the legislature provided criteria that Defendant Branstad was required to consider. 2008 Iowa Acts 1191 § 13 (emphasis added). Defendants have admitted that he did not. (Tr. 6/6/2019 pp. 31-32, 36) Instead of using criteria set forth in the statute, Defendants weaponized the discretion granted by the statute to punish Plaintiff for not resigning and/or not complying with the Republican agenda Defendant Branstad wished to advance by appointing his "own team." Had Plaintiff been given the opportunity to know what Defendant Branstad expected and had complied, he would have violated his ethical obligation to decide cases