SPECIAL REVIEW

EMPLOYMENT TERMINATION SETTLEMENTS
JULY 1991 - SEPTEMBER 1992

MARCH 1993

Financial Audit Division
Office of the Legislative Auditor
State of Minnesota

93-10

Centennial Office Building, Saint Paul, MN 55155 ● 612/296-4708

SPECIAL REVIEW
EMPLOYMENT TERMINATION SETTLEMENTS

March 19, 1993 **#93-10**

OBJECTIVES

The Financial Audit Division conducted a special review of employment termination settlements. Our review focused on agreements where the state made settlement payments in order to obtain resignations from employees. We concentrated on the time period July 1, 1991 through September 30, 1992 and addressed questions in three areas:

- **How extensive are employment termination settlements? How often do settlements occur and at what cost?**
- **Why does the state enter into these settlements with employees? Does the state resist efforts to make settlement payments to departing employees?**
- **What information on the settlements is made available to the public?**

CONCLUSIONS

During the 15-month period ending in September 1992, we found 14 employment termination settlements which required payments to state employees. These settlements cost the state an estimated $355,000. During this same time period, the state negotiated seven other settlements which did not require payments to employees. Settlements are relatively rare, considering that annual state payroll is $1.6 billion and that nearly 1,000 state employee terminations occur each year.

In the 14 cases, the state essentially was willing to purchases the position rights held by the employees. Four settlements were negotiated directly by state agencies. The State Labor Negotiator settled the other ten cases, rather than having the disputes resolved by final arbitration.

We accept that, under certain circumstances, employment termination settlements may be justified. However, we have several concerns with these cases. First, we question whether state agencies may authorize employment termination settlements unilaterally, as with the four cases which state agencies negotiated directly. For a variety of reasons, we think these four agreements should have received more oversight and control. Therefore, we recommend that the Department of Employee Relations play an active role in negotiating and authorizing settlements. We also found that the terms of these four settlements were overly complex and contained some questionable provisions. Accordingly, we recommend that the state use a more reasonable basis for judging the settlement amounts and to make the settlement terms more straightforward.

The other ten cases required settlement payments to classified employees who had appealed discharge decisions made by state agencies. These cases would have proceeded to binding arbitration if the settlements had not occurred. In arbitration, the state would have had to prove that the agencies had "just cause" for dismissing the employees. Thus, the settlements allowed the state to terminate employment, without facing the uncertainty of the arbitration process. But, in these ten cases, the terminations cost the state a

settlement payment. We have some concerns about the basis for these payments.

Also, after reviewing several other cases which proceeded to binding arbitration, we developed recommendations in two additional areas. First, agencies must conduct thorough, fair personnel investigations before taking disciplinary action against employees. When necessary, agencies should use investigative resources available through the Department of Employee Relations. We also recommend that the Legislature consider establishing a statutory definition for "just cause" to discharge an employee. The present process extends too much discretion to arbitrators.

Finally, we considered the data practices issues regarding employment termination settlements and personnel investigations. We are disturbed by the degree of secrecy surrounding most settlement agreements, especially for high-level state officials. We also object to the "window dressing" provisions in some agreements which attempted to construct misinformation about the employment relationship. In addition to information on settlement agreements, we recommend that more information on personnel investigations should be classified as public data. We are particularly concerned about situations when the state cannot disclose its findings after allegations about employee misconduct have been made publicly.

The Department of Employee Relations has submitted a written response which is attached to the report.

Contact the Financial Audit Division for additional information.
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Ms. Linda Barton, Commissioner
Department of Employee Relations

We have conducted a special review of the state's practice of making settlement payments in order to obtain resignations from some employees. We conducted the review because, recently, we became aware of several agreements that caused us concern. As a result, we wanted to obtain more comprehensive information about employment termination settlements, and we wanted to gain a fuller understanding of the issues involved.

Scope

Our review concentrated on the time period July 1, 1991 through September 30, 1992. However, we also analyzed data from earlier years to determine whether or not this time period is representative of the state's experience. Our review addressed the following questions:

- How extensive is the state's practice of making settlement payments so that employees will agree to resign? How many employees have received payments and at what cost? Do the settlement payments show any kind of trends?

- What is the basis for the payments? Are some settlement processes more expensive than others? What factors determine the settlement amounts? How successful is the state in resisting efforts to make settlement payments to departing employees?

- What are the data practices implications of settlement agreements? How is public data distinguished from private data? To what extent has the state agreed to withhold information from the public?

The primary purpose of our review was to gain a better understanding of the financial activities and issues involved in employment termination settlements. In addition to reporting our findings to the Legislature, we have also developed some recommendations which we believe will enhance the state's accountability for future employee settlements.

Confidentiality

We are concerned about termination settlement agreements in part because they are almost always classified as private; thus, undermining accountability. Despite our concerns, we are obligated by the Minnesota Government Data Practices Act to preserve the confidentiality of certain information in the agreements. To do that and still report our findings, we have aggregated data and referenced settlement provisions in a manner which does not identify specific employees.

Management Responsibilities

We addressed our findings primarily to the Department of Employee Relations. We realize that in reality it is the decisions or actions of other state agencies that create or contribute to the settlement agreements. The Department of Employee Relations and, on some occasions, the Office of the Attorney General are often asked to intervene only after a problem is discovered.

We believe it is appropriate to ask the Department of Employee Relations to serve a leadership role in this area for state government. Settlement agreements are not routine transactions for state agencies. Also, the provisions of employment law and state collective bargaining agreements are complex and require highly specialized knowledge. Thus, it is often necessary for agencies to rely on the expertise of the Department of Employee Relations and the Office of the Attorney General.

Despite our focus on the Department of Employee Relations, if the state is to tighten its controls over settlement agreements, the cooperation of all state agencies is needed.

Techniques

We searched several sources in an attempt to locate cases which were suitable for this review. Specifically, we were interested in finding cases where disputes had arisen because a state agency had attempted to discharge or terminate an employee. During our search, we analyzed the following sources:

- the state payroll system for payments recorded as either grievance or personal injury settlements,
- the state personnel system for employee terminations,
- records maintained by the Department of Employee Relations on employee grievances, including those cases which were settled and those cases that proceeded to arbitration, and

- summaries of State of Minnesota arbitration cases maintained by the Bureau of Mediation Services.

Finally, we asked the Office of Administrative Hearings whether it had received any appeals involving attempted discharges of state employees. It reported no cases in recent years.

To provide an appropriate context for our review, we attempted to identify as many cases of disputed employee discharges as possible. However, we realized that some courses of action could not be readily identified. An employing agency could use informal methods to convince an employee to resign voluntarily. For example, the agency could change an employee's work assignments, decline to offer discretionary salary raises, or bypass the employee for promotions. Thus, we ultimately had to limit our analysis to those cases where the dispute was made formal, e.g. arbitration cases, lawsuits, or settlement agreements.

We obtained copies of documentation supporting settlement payments from the Department of Employee Relations. We also reviewed applicable state laws, policies, and terms of collective bargaining agreements. Finally, we discussed our findings with staff from the Department of Employee Relations and the Office of the Attorney General. We asked the Department of Employee Relations to provide a written response to our final report draft (see attached response).

Conclusions

We found relatively few cases where state agencies made settlement payments in order to obtain resignations from employees. During the 15-month period ending in September 1992, we found 14 cases. We estimate that the settlement terms cost the state about $355,000 to terminate the employment of these 14 employees. Compared to state payroll of $1.6 billion for fiscal year 1992, the settlement amount is small. Also, compared to the nearly 1,000 employee terminations during the fiscal year, the incidence of settlement payments was relatively rare.

Despite the relative infrequency, we remained concerned about these settlement payments. Their existence means that the state may have compromised important principles in these cases. Not only has the state made questionable payments in some cases, but it has often done so in extreme secrecy. We accept that, under certain circumstances, employment termination settlements are justified. However, the terms of these agreements should be more straightforward and subject to greater public disclosure.

Chapter 1 provides a more extensive context for the state's experience with employee settlements, terminations, and arbitration cases.

Chapter 2 analyzes the financial implications of cases involving disputed employee discharges. We reviewed the state's experience with settlements negotiated both by the State Labor Negotiator and directly by state agencies. We conclude that the state needs to strengthen its accountability and oversight for these settlements. We also reviewed arbitration decisions where public employee unions had appealed the state's attempts to discharge state employees. For the most part, we believe the arbitration process has produced fair decisions. However, we think state law should establish more stringent standards to guide arbitration decisions.

Chapter 3 reviews the data practices implications of employee settlement agreements. We are disturbed by the degree of secrecy afforded to most settlement agreements. In some cases, the agreement essentially conceals the existence of a dispute. In extreme cases, we find that the agreement helps manufacture misleading information about the nature of an employment relationship.

We developed ten recommendations which are contained in Chapters 2 and 3. Some recommendations are intended to help the Department of Employee Relations strengthen its position in resolving disputed employee discharges. Other state agencies should also find this report and its recommendations helpful when resolving disputes with employees.

The recommendations from three audit findings require legislative action in order to be implemented.

- For finding 7, we recommend that state law should expand and clarify the definition of "just cause" for employee discipline, particularly the criteria which justifies terminating employment.

- For finding 8, we suggest that state law should prohibit secret settlement agreements with high-level state officials.

- For finding 10, we recommend that the Legislature broaden the public disclosure requirements for personnel investigations.

This report is intended for the information of the Legislative Audit Commission and the Department of Employee Relations. This restriction is not intended to limit the distribution of this report, which was released as a public document on March 19, 1993.

James R. Nobles
Legislative Auditor

John Asmussen, CPA
Deputy Legislative Auditor

Report Signed On: March 15, 1993

Table of Contents

Chapter 1. Overview: Employee Settlements, Terminations & Arbitration

To place our review in an appropriate context, we analyzed the state's experience with employee terminations and dispute resolution from a fairly broad standpoint. The state work force includes over 30,000 employees. As shown in Table 1-1, its annual payroll now exceeds $1.6 billion.

Table 1-1
State Government Payroll
Fiscal Year Ended June 30, 1992

Classified Employees - Regular Pay	$1,093,000,000
Unclassified Employees - Regular Pay	396,000,000
Part-Time & Seasonal Employees	64,000,000
Overtime & Premium Pay	32,000,000
Severance Pay	14,000,000
Workers Compensation	16,000,000
Unemployment Compensation	5,000,000
Miscellaneous Payroll & Benefits	71,000,000
State Payroll	$1,691,000,000

Notes:
(1) The source of this information is the Statewide Accounting System, Manager's Financial Report as of 9/6/92.

(2) Payroll shown does not include amounts for quasi-state entities, such as the University of Minnesota.

As might be expected for a large employer, the state experiences a fair amount of employee turnover. As shown in table 1-2, nearly 1,000 full-time employees of the Executive Branch left state employment during fiscal year 1992. Most of these employees (classified service and tenured faculty) had established certain rights to their positions and could only be discharged for just cause. The table shows that only 39 classified or tenured employees were dismissed from state employment in fiscal year 1992. Some unclassified employees also may have limited contractual or statutory rights to their positions. For a few unclassified positions, employing agencies must establish just cause to dismiss employees. In other cases, typically for the administrative staff of higher education systems, the employing agency must provide notice of at least six months if it chooses to dismiss an unclassified employee. The more traditional unclassified employees, such as commissioners, assistant commissioners, and deputies, serve at the pleasure of the appointing authority.

Employment Termination Settlements

Table 1-2
State of Minnesota - Executive Branch Employee Terminations
July 1, 1991 thru June 30, 1992

Reason	Classified Service	Tenured Faculty	Unclassified Service	Probationary Employees	Totals
Voluntary Resignation	355	1	25	38	419
Deaths	45	1		1	47
Retirement	326	34	10	5	375
Dismissals	39		1	17	57
Other Terminations and Separations	17	4	53	1	75
Totals	782	40	89	62	973

Notes:

(1) Information based on data recorded on the state personnel system for Executive Branch agencies. It excludes employees of the Legislature, judicial agencies, and the University of Minnesota.

(2) This information has limited value for gaining an understanding of the extent of disputed discharges. Employee terminations resulting from settlement agreements are recorded on the personnel system in various forms. Some are shown as voluntary resignations, some as dismissals or terminations, and others as retirements.

(3) For employee terminations resulting from settlement agreements, there is often a timing difference between when the state records the employee's termination and when it makes the settlement payment. For the 14 termination settlements discussed in Chapter 2, the personnel system shows employment end dates ranging from fiscal year 1991 to 1993.

The information in Table 1-2 provides useful background information. However, it does not reveal whether or not employee terminations result from settlement agreements.

Employee Settlement and Award Payments

We constructed a population of employee settlement and award payments based on data recorded on the state's central payroll system. We extracted payment data for transactions coded on the system as grievance or personal injury settlements. The population included transactions recorded between July 1, 1989 and September 5, 1992. The payroll system does not distinguish payments resulting from disputed employer discharges from payments resulting from other types of disputed matters. Table 1-3 shows that the state spent $1.9 million to resolve all types of employment disputes with 872 employees over this 3 1/4 year period.

Employment Termination Settlements

Table 1-3
Employee Settlement and Award Payments
July 1, 1989 - September 5, 1992

Employing Agency	Number of Employees	Total Payments	Average Payment	Payments<1,000 Number	Payments<1,000 Amount	Payments>$1,000 Number	Payments>$1,000 Amount
Human Services	251	$311,394	$1,241	221	$39,135	30	$272,259
Transportation	106	221,102	2,086	92	10,968	14	210,134
Corrections	83	61,317	739	73	12,249	10	49,068
Community College System	66	241,509	3,659	24	10,113	42	231,396
Jobs and Training	58	129,749	2,237	42	11,520	16	118,229
State University System	45	519,698	11,549	17	4,858	28	514,840
Veterans Affairs/Homes	45	60,767	1,350	39	5,940	6	54,827
Natural Resources	43	42,220	982	33	7,571	10	34,649
Administration	37	45,949	1,242	28	4,370	9	41,579
Education	31	15,812	510	27	8,322	4	7,490
Public Safety	27	81,897	3,033	20	4,175	7	77,722
Revenue	19	44,414	2,338	13	5,490	6	38,924
Labor and Industry	10	7,155	716	8	2,200	2	4,955
All Others	51	132,194	2,592	30	9,892	21	122,302
Totals	872	$1,915,177	$2,196	667	136,803	205	$1,778,374

Notes:
(1) This information was extracted from the state payroll system. It does not include data on quasi-state entities, such as the University of Minnesota.

(2) These payments resulted from employer actions which employees disputed. Common disputes involved work rules, rates of pay, and justification for disciplinary actions. Few of the payments shown in the table would have resulted from disputed discharge cases.

Data from our other sources suggests that less than 100 of these 872 employees were paid as a result of disputed discharge decisions. Although we did not analyze the circumstances causing these other payments, we can make the following observations about the data in Table 1-3:

- Settlement payments are most prevalent and expensive for the State University System and Community College System. The state university settlements averaged over $11,500. The community colleges had 42 settlements over $1,000, the most of any state agency. Our review did not include the University of Minnesota. But our past audits of the University have cited employee settlements as a problem area.

- The state's largest employing agency, the Department of Human Services, made the most settlement payments.

Employment Termination Settlements

- Over 90 percent of the total payout for settlements went to 205 employees who received over $1,000 each. Over two-thirds of the total payout went to 46 employees who received at least $10,000 each. [23 payments of at least $10,000 occurred prior to July 1, 1991.]

- Thirteen state agencies paid at least ten settlements during the 3 1/4 years. Seventeen other agencies had at least one settlement payment during that time period.

For purposes of further analysis, we concentrated on 23 settlement payments of at least $10,000 which occurred between July 1, 1991 and September 5, 1992. We found ten settlement agreements which required the employees to resign. After reviewing information at the Department of Employee Relations, we found another four settlement agreements paying less than $10,000 and requiring the employees to resign.

We make the following observations based on our analysis of the 23 settlements of at least $10,000.

- Sixteen settlement payments resulted from disputed discharge cases. In ten cases the state paid the settlement as a condition of obtaining the employee's resignation. The other six payments were made for cases which required the state to reinstate the employee.

- The other seven settlements were not the result of disputed discharge cases. Four settlements were based on harassment claims filed by employees. These tended to be fairly expensive settlements, averaging over $40,000 each. The remaining three settlements were based on other disputes: a lawsuit of unspecified issues, discriminatory hiring practices, and unjust denial of a promotion.

The state often encountered costs beyond the settlement payments recorded on the payroll system, so the information in Table 1-3 understates the state's total expense. Examples of added costs include: unemployment compensation reimbursements, moving costs, medical expenses, attorneys' fees, educational expenses, paid leave during investigatory suspensions, and the cost of carrying employees on the payroll under the guise of completing special projects. Also, we found one case which was not processed through the payroll system. The state issued the settlement payment through the accounting system instead. The settlement agreement required that the award was to be made jointly payable to the employee and the employee's attorney. The payroll system could not produce such a joint payment, so it was processed through the accounting system.

Employment Termination Settlements

Arbitration Cases

We reviewed employment disputes that were appealed to the arbitration process to learn the extent to which the state has resisted making settlement payments. We were also interested in knowing how often arbitrators upheld the state's discharge decisions, compared to arbitration decisions which ordered the reinstatement of employees. Some state agencies have expressed a reluctance to take their chances in arbitration. Thus, we wondered whether the outcome of arbitration decisions revealed any valid justification for the state making settlement payments to avoid arbitration.

We reviewed records maintained by the Department of Employee Relations and summaries of arbitration cases maintained by the Bureau of Mediation Services. Table 1-4 shows a summary of recent arbitration decisions involving state employees.

Table 1-4
Arbitration Rulings on Employment Decisions Made by State Agencies
For the 45-Month Period From January 1989 thru September 1992

Nature of Dispute	Appeals Denied/ Employing Agency Decision Upheld	Appeals Sustained In Favor of Employees Fully	Appeals Sustained In Favor of Employees In Part	Total Decisions
Disciplinary Action				
Discharges (2)	20	10	12	42
Demotions	1	2		3
Suspensions	6	7	9	22
Written Reprimand	1			1
Employer Selections				
Promotions	6			6
Work Assignments	2			2
Benefit Eligibility	4	1	2	7
Other Issues	2	1		3
Total	42	21	23	86

Notes:
(1) This information is based on records obtained from the Bureau of Mediation Services and the Department of Employee Relations. It summarizes arbitration cases involving State of Minnesota Executive Branch employees.

(2) The analysis includes one arbitration ruling which rendered a decision contingent on the outcome of a court case. It is listed as partially sustained in the table.

(3) The table includes only cases which proceeded to final arbitration decisions. Approximately 2,000 grievances were filed on behalf of state employees during this time period. Most cases were withdrawn or settled prior to arbitration.

Employment Termination Settlements

Based on our analysis of these arbitration cases, we make the following observations:

- Decisions were evenly divided in the cases which involved a dispute over an employee's discharge. Arbitrators ruled in favor of the employing agency in about half the cases and in the employees' favor for the other half.

- The employees prevailed in the majority of cases which involved lesser forms of discipline, specifically employee suspensions. Arbitrators either reduced or eliminated employer imposed suspensions in over 70 percent of the cases.

- The state prevailed in all eight cases where the union challenged the employing agencies authority to use its prerogative in making promotion and work assignment decisions.

We also looked at which state agencies were involved with the 68 disputed disciplinary action cases listed in Table 1-4. Our analysis revealed the following:

- The Department of Human Services, the state's largest employing agency, was involved with 14 cases, the most for any agency. It was not very successful, as arbitrators ruled in favor of the employees in 12 of the 14 cases.

- The Department of Jobs and Training was involved with 13 cases. Arbitrators ruled in favor of Jobs and Training in the majority of the cases, thereby upholding its disciplinary actions.

- The community colleges and state universities, were involved in relatively few cases. Five of the six cases involving either the state universities or community colleges concerned their prerogative to renew a nontenured faculty contract. None of the six cases alleged misconduct by the employees. It is ironic that the colleges and universities are involved in so few cases, considering that the employee settlement payments were most prevalent for these two higher education systems.

We were particularly interested in the disciplinary cases where the employing agency had sought to discharge an employee. Table 1-4 shows 42 arbitration cases which concerned disputed discharges. But according to records maintained by the Department of Employee Relations, during this time period a total of 160 grievances were filed in order to dispute discharge decisions made by state agencies. As shown in Table 1-5, 49 grievances were withdrawn or closed and 69 cases were settled prior to reaching arbitration. The table also shows that the state ultimately reinstated 56 of the 160 employees who had grieved the discharge decisions.

Employment Termination Settlements

Table 1-5
State of Minnesota
Employee Discharges - Grievances Filed
For the 45-Month Period From
January 1989 thru September 1992

Disputed Resolution	Withdrawn or Closed	Cases Settled	Arbitration Decisions	Total Cases
Reinstatements:				
Required Payments				
Lost Wages		4	10	14
Settlement Award		5		5
Without Payment (2) (3)		25	12	37
Reinstatements		34	22	56
Terminations:				
Negotiated Payments		18		18
Without Payment	49	17	20	86
Terminations	49	35	20	104
Total Cases	**49**	**69**	**42**	**160**

Notes:
(1) This information was obtained from the Department of Employee Relations records on grievances filed on behalf of state employees with union representation.

(2) Some of these cases may have required payments for issues other than the discharge, for example, a ruling that an unpaid suspension was unwarranted.

(3) One case remains pending an appeal to the Minnesota Supreme Court.

(4) The table does not include discharge decisions disputed by employees which are not eligible for arbitration (unclassified or unrepresented employees). It also excludes discharge disputes challenged through mechanisms other than grievances, for example, by the threat of litigation.

We then analyzed the 42 disputed discharge cases which reached final arbitration. We attempted to gain a better understanding of the basis for the arbitrators' decisions and what forms of alleged employee misconduct substantiated just cause for upholding discharge decisions. Table 1-6 shows our analysis of these 42 cases.

Employment Termination Settlements

Table 1-6
Arbitration Rulings on Employee Discharge Cases
For the 45-Month Period from January 1989 thru September 1992

Events Causing Discharge	Employee Discharges Upheld	Employees Reinstated Due to Lack of Evidence	Employees Reinstated For Other Reasons	Total Cases
Alleged Employee Misconduct:				
False Claims or Reports	1		5	6
Insubordination/Disloyalty	1	3	2	6
Excessive Absenteeism	5		1	6
Theft	3	1	1	5
Patient Abuse	1	2		3
Sexual Harassment	2			2
Drug/Alcohol Use on Job	1	1		2
Improper Conduct - Off Job	1		1	2
Misuse of State Property	1	1		2
Conflict of Interest	1			1
Violation of Federal Law		1		1
Nonrenewal of Faculty Contract	2	3		5
Physically Unable to Work	1			1
Total Cases	20	12	10	42

Note:
(1) Information is based on an analysis of the 42 disputed discharge cases which reached final arbitration. See notes to Table 1-4.

We also looked for reasons why arbitrators overturned the state's discharge decisions when misconduct was alleged. In 12 of these 22 cases, the arbitrator essentially concluded that the state had not produced sufficient evidence to prove its case. Clearly, the arbitrators placed the burden of proof on the state. The other ten cases produced a mix of reasons:

- For six cases, the state proved that the employees were guilty of theft or filing false information, yet the arbitrator reinstated the employees. In essence, the arbitrator rationalized that the state had suffered minimal financial losses. The theft case involved food that was probably destined for the trash. The false claim cases either involved small dollar amounts or the arbitrators reasoned that the false data did not necessarily result in an overpayment to the employees. The arbitrator also cited other mitigating circumstances in some of these cases.
- In the two insubordination cases, the state proved that the employees had used deceitful tactics in an attempt to oust their supervisor. Yet, again, the arbitrator decided to reinstate the employees. The arbitrator concluded that an extensive

unpaid suspension was appropriate punishment for these two employees, but that the dismissals were not warranted.

- In the case of alleged excessive absenteeism, the arbitrator sympathized with the employee's extensive personal problems and felt that the state should give the employee one more chance. Although union representatives often argued that employees deserved special consideration because of personal problems, this is the only disputed discharge case where the arbitrator agreed.

- In the other case, the arbitrator failed to find a link between the employee's off-duty conduct and job performance.

To us, these cases revealed a weakness in the arbitration process-- the lack of a standard for justifying employee discharge. As a result of the uncertain outcome of arbitration, the state has been willing to make settlement payments to ensure that employment is terminated in some cases. We elaborate on our analysis of the arbitration cases in Chapter 2. Specifically, we developed audit findings six and seven in regard to the arbitration process.

Summary

Based upon our search of state personnel, payroll, and arbitration records, we found 14 cases where state agencies made settlement payments in order to obtain an employee's resignation. Our search focused mostly on cases which occurred in fiscal year 1992. We also analyzed data from earlier fiscal years to satisfy ourselves that fiscal year 1992 was representative of the state's recent experience.

Compared to total state payroll and employee attrition rates, the occurrence of negotiated settlement cases is relatively rare. But a further analysis of these 14 cases reveals several areas where the state needs to strengthen accountability and oversight. Agreements have become too complicated and sometimes contain unusual terms. Also, we found too much secrecy associated with the settlements. We accept that, under certain circumstances, employment termination settlements are justified. But, as discussed in Chapters 2 and 3, the settlement terms should be more straightforward and subject to greater public disclosure.

Employment Termination Settlements

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Chapter 2. Analysis of Disputed Discharge Cases - Financial Implications

After finding the 14 employment termination settlements cited in Chapter 1, we stepped back to review a broader context of all cases where employees disputed the state's efforts to terminate their employment. With the help of the Department of Employee Relations, we found a total of 71 cases of disputed employee discharges during the same time period. In 51 of the 71 cases, employment ultimately was ended.

- In 21 cases, employees withdrew or closed the grievances prior to reaching the point of settlement or arbitration.

- Nine cases proceeded to arbitration decisions which upheld the outright discharge of the employees.

- The state agreed to some form of negotiated settlement for the remaining 21 termination cases. It agreed to make settlement payments to 14 of these 21 employees. The other seven employees simply agreed to resign voluntarily, rather than face formal discharge proceedings.

In the remaining 20 cases, the state was required to reinstate the employees (although one case remains under appeal).

- Ten cases required the state to make a financial payment, in addition to reinstating the employee. Five payments were based on wages lost by the employee. The other five employees received a settlement award to avoid the potential costs of further arbitration or litigation.

- Ten cases required the state to reinstate the employee without making any financial payment. In five cases, the arbitrators essentially ruled that the employees were at fault and deserved some consequences, but that termination was too harsh of a disciplinary action. In the other five cases, the state was willing to reinstate the employees.

Table 2-1 shows a summary of outcome of the 71 cases of disputed employee discharges.

Employment Termination Settlements

Table 2-1
State of Minnesota
Disputed Employee Discharges
For the 15-Month Period from
July 1, 1991 thru September 30, 1992

Dispute Resolution	--Grievances Filed-- Withdrawn	Settlements	Arbitration	Agency Negotiated Settlements	Total Discharge Cases
Reinstatements:					
Required Payments					
Lost Wages		1	4		5
Settlement Award		4		1	5
Without Payment(2)(3)		5	5		10
Reinstatements		10	9	1	20
Terminations:					
Negotiated Payments		10		4	14
Without Payment	21	7	9		37
Terminations	21	17	9	4	51
Total Cases	**21**	**27**	**18**	**5**	**71**

Notes:
(1) This information is a composite of records obtained from the Department of Employee Relations, the Bureau of Mediation Services, and the State Payroll System.
(2) Some of these cases may have required payments for issues other than the discharge, for example, a ruling that an unpaid suspension was unwarranted.
(3) One case remains pending an appeal to the Minnesota Supreme Court.

Most cases (66 of the 71) utilized the dispute resolution procedures established by state law and the respective collective bargaining agreement. In most dispute resolution proceedings, employees receive representation from their union. The State Labor Negotiator in the Department of Employee Relations retains the ultimate responsibility to represent the state. The state is permitted to settle the dispute at any time prior to reaching final arbitration. State law also allows the state to make settlement payments for hours not worked by an employee, if an agreement is reached in order to resolve a formal grievance procedure. Only 18 of the 66 cases required all steps of the dispute resolution process and resulted in an arbitration decision.

The state paid monetary awards to employees in 24 cases. Ten of the awards went to employees who were also reinstated to their positions. The combined costs of back pay and settlement awards was $191,000 for these ten employees.

Employment Termination Settlements

- Arbitrators ruled that the state had to award back pay for lost wages to four employees it was required to reinstate. In these cases, arbitrators concluded that the state failed to justify taking disciplinary action against the employees. Thus, they ordered the state to "make the employees whole." Back pay cost the state an average of $21,000 for each of the four employees. In five other cases, arbitrators rendered split decisions and ordered the employees to be reinstated, but without back pay.

- The payments to the other six reinstated employees resulted from negotiated settlements, at an average cost of $18,000 per employee. These payments were usually presented as settlement awards, rather than back pay for lost wages.

The 14 employment termination settlements cost the state about $355,000. One settlement cost the state over $100,000, while four cost less than $10,000 each. Both the financial terms and other provisions varied greatly depending upon the dispute resolution process. Two distinct processes existed for state employees who wished to dispute an employing agency's discharge decision. The most common process was for employees to appeal the decision by filing a grievance with the employing agency. For the ten settled grievance cases, which required the employees to resign, the state paid an average of $13,000 per employee. Employees not eligible for the arbitration process filed or threatened to litigate the matter in order to negotiate a settlement directly with the employing agency. The four termination settlements negotiated directly by state agencies had an average cost of over $50,000 per employee.

Settlements Negotiated by State Agencies

We found five cases where a state agency had negotiated a settlement in order to resolve a disputed discharge with an employee. These cases were more complicated and costly than the cases handled by the State Labor Negotiator. Four of the five cases resulted in an employment termination settlement. In the other case, the state agency agreed to reinstate the employee and make a settlement payment.

In most of these five cases, the employees were not eligible to file for arbitration, but hired a private attorney and threatened to file litigation against the state. In only one of the five cases, however, did an employee actually file a lawsuit against the state. The settlement payments in these five cases were based on avoiding the costs of potential litigation.

Most cases involved unclassified employees who possessed some form of contractual or statutory rights to their positions. These employees were able to claim position rights, at least temporarily, because the employing agency either had to provide advance notice of dismissal or was required to prove just cause for dismissal. We did not find any cases where settlement payments were made to unclassified employees who served at the pleasure of the appointing authority, such as commissioners.

Employment Termination Settlements

We have several concerns about the settlements negotiated directly by state agencies. First, we did not find clear authority for state agencies to incur these costs. We also have several concerns about the financial terms of the agreements.

1. The state's authority to execute some employee settlement payments is unclear.

We did not find any provisions of state law which authorize state agencies to execute settlement agreements with unclassified employees. We also question whether agencies have the authority to negotiate settlements with classified employees who have not used the formal grievance resolution process. We realize that any employee may choose to file a lawsuit as a means to dispute a discharge decision. But when a lawsuit is filed, court procedures would provide oversight and authority for settlements negotiated prior to trial.

As discussed later in this chapter, Minn. Stat. Section 43A.04, Subd. 6, clearly establishes authority for the Department of Employee Relations to approve payments which settle employee grievances. That law, however, contemplates that both (1) a formal grievance had been filed and (2) the settlement was authorized by the Department of Employee Relations. We found one or both of these conditions lacking with the settlements negotiated directly by state agencies.

The only common party signing these five settlement agreements was the Office of the Attorney General. Yet, representatives of the Attorney General emphasized that their approval is limited to the "form and execution" of the agreements. Their approval indicates simply that the agreements contain the appropriate waivers and disclaimers. The Attorney General's Office relies on the employing agency to determine the substantive terms of the settlements, including award amounts.

We are troubled by the lack of strong central leadership and oversight demonstrated by these five settlement agreements negotiated directly by state agencies. The unique and infrequent nature of the settlements often caused state agencies to struggle with these decisions. The agencies were at a particular disadvantage when an employee hired an attorney who had expertise in employment law. Furthermore, in some cases, we suspect that state agencies were anxious to settle quietly to avoid public embarrassment.

Thus, we believe it is important for the conditions of Minn. Stat. Section 43A.04, Subd. 6, to be observed for all settlement agreements. Employees who wish to appeal a discharge decision should be expected to file a formal grievance in order to start the dispute resolution process. The Department of Employee Relations should be involved with the negotiations so its expertise is available to the employing agency.

In addition to these disputed discharge cases, we found four harassment complaints where the state agencies had negotiated a settlement outside any formal dispute resolution processes. The employees did not file a formal grievance or complaint. Internal complaints were made known to management of the employing agency, and settled before proceeding

outside the agency. The Department of Employee Relations did not approve these settlements. We believe the public interest is best served if the formal dispute resolution procedures are observed and the department authorizes the agreements.

Recommendations

- *State agencies should consider negotiating settlement agreements only when employees have filed formal grievances.*
- *The Department of Employee Relations should play an active role in overseeing and authorizing negotiated settlements.*

2. Basing settlement payments on the projected savings of avoiding litigation is a questionable practice.

Settlements negotiated directly by state agencies typically cited avoiding potential litigation costs as justification for settlement payments. However, we observed that the payment amount usually correlated to the employee's salary, rather than an estimate of potential litigation costs. Typically, these settlement payments equalled about eight months salary for the employee. In one case, it amounted to ten months of salary. In no case did we find an analysis of the projected costs of litigation. We suspect that the payments are portrayed as "personal injury damages to avoid the costs of arbitration and/or litigation ...", simply as a mechanism to shelter the payments from tax withholdings.

We are also troubled by the notion that an employee facing termination, presumably after performing poorly, is provided with a settlement payment to leave state employment. The argument that the state is saving money is unconvincing because the state is essentially being pressured into compromising its principles. The Attorney General's Office points out that in some cases, the state may have been vulnerable to employees filing lawsuits claiming defamation of character. However, if the state has caused personal injury or damage to an employee, then we think it should use an assessment of the cost of those damages as a basis for a settlement payment. When the state believes it can win a court case, then we think it should take a firm stand against these threats and vigorously defend itself in court.

Recommendations

- *When litigation is threatened, the state should assess the potential court decision. If the state believes an adverse court decision is likely, it should use an estimate of the potential court award to the employee as a basis for negotiating a possible settlement payment. The state should not base settlement payments on the foregone costs associated with lawyers fees.*

Recommendations (Continued)

- *If the state believes it has a good chance of prevailing in a court case, it should defend the case vigorously and not make a settlement payment.*

3. Settlement payments sometimes disregard eligibility standards established by state bargaining agreements.

We observed that some settlement agreements contained clauses which essentially waived the eligibility standards of state bargaining agreements or employment contracts. For example, we found a case of an employee being granted an enriched severance payment. The employment provision required the employee to have ten years of state service in order to claim a percentage of unused sick leave as severance pay. The settlement agreement contrived a series of events which allowed the employee to surpass the ten year requirement and become eligible for the enhanced severance pay. In another case, an employee of a higher education system was allowed to continue receiving a tuition waiver benefit after terminating employment. Higher education employees are allowed to take some education courses, without paying tuition; but, the benefit does not extend to former employees. Exceptions to the terms of the bargaining agreements should be limited. Certainly, it does not make sense to grant exceptions to employees who are being terminated.

Recommendation

- *The state should not use settlement agreements to bypass the benefit eligibility requirements of bargaining agreements or employment contracts.*

4. One settlement obligated the state to accept a work product unilaterally, without challenge, from an employee who had agreed to resign from state employment at a prescribed future date.

We were particularly concerned with one settlement provision which obligated the state to accept a special work assignment from an employee who was being terminated. The agreement provided that the employee was required to resign voluntarily at a prescribed future date. In the meantime, the employee was directed to complete a special assignment. The agreement, however, barred the state from challenging the quality of the employee's work on the special assignment. The state could not "reject any work product submitted by [the employee] in connection with the special assignment based on [its] judgment or evaluation of the quality, quantity, or other characteristics." We doubt that the state would accept these terms with any consultants or independent contractors. It also would not tolerate this kind of arrangement with other employees. Therefore, we believe it is an inappropriate provision for a settlement agreement.

Recommendation

- *The state should avoid the inclusion of special work assignments in settlement agreements with employees. If the employment relationship is being ended, it should be ended promptly and completely.*

Settlements Negotiated by the State Labor Negotiator

Collective bargaining agreements and other state employment plans identify formal dispute resolution procedures. The initial steps of these processes attempt to resolve disputes informally within the employing agency. The resolution steps become increasingly formal. For classified employees with union representation the final step of the process is binding arbitration. For classified employees without union representation, the final step is an appeal before an administrative law judge. Unclassified employees do not have the right to a hearing before either an arbitrator or an administrative law judge.

Once a formal grievance has been filed, the State Labor Negotiator may authorize a settlement agreement prior to receiving a final decision from an arbitrator or administrative law judge. This authority is contained in Minn. Stat. Section 43A.04, Subd. 6, and reads as follows:

> Notwithstanding any other law to the contrary, the commissioner may authorize an appointing authority to pay an employee for hours not worked, pursuant to the resolution of a grievance through a formal grievance procedure established by a collective bargaining agreement or one of the plans established pursuant to section 43A.18.

As shown in Table 2-1, during the 15-month period ending in September 1992, state employees filed 66 grievances to dispute discharge decisions made by state agencies. Employees eventually withdrew 21 of these grievances and 18 cases proceeded to final arbitration. The State Labor Negotiator authorized settlement agreements for the remaining 27 grievances. Ten settlements resulted in state agencies reinstating the employees to their positions. These settlements were resolved in a manner that was quite consistent with the kind of decisions made by arbitrators--about half of the employees received some form of payment in addition to being reinstated. Arbitrators, however, may award payments only in the form of backpay for lost wages. Despite the form of the payment, on average, it was somewhat less expensive for the state to reinstate employees through settlements than to have the reinstatements ordered by arbitrators. Assuming that the State Labor Negotiator evaluated these cases and concluded that the state agency could not prove just cause to support its discharge decision, it was to the state's advantage to settle with these employees rather than proceed to arbitration.

Of the 17 cases where employees resigned, the state agreed to make settlement payments to ten employees. Seven employees agreed to resign voluntarily without any payment. In contrast to the settlements negotiated directly by state agencies, these 17 agreements were more straightforward. The settlements, which provided for a direct payment, were in round dollars; for example, three agreements paid employees $10,000 each. Other payments ranged from $1,500 to $35,000. These agreements did not contain the complications we found in those negotiated directly by state agencies; for example, there were no special work assignments and no exceptions to other employment provisions. But we remain concerned about the basis for these direct settlement payments.

5. Basing settlement payments on the projected savings of avoiding prolonged arbitration is a questionable practice.

Grievance settlements which required an employee's resignation typically justified the settlement payment on savings accrued by avoiding potential litigation costs. These agreements cite the basis of the payment as being for "personal injury damages" and include the following clause:

> These damages are granted in this Settlement and Release expressly because the parties hereto seek to avoid the potential risks and expenses of arbitration and/or litigation and are not intended to compensate the grievant for lost wages.

Again, we suspect that the payments are portrayed in this manner simply as a mechanism to shelter the payment from tax withholdings. However, we observed a rough correlation between the payment amount and the employee's salary. The $10,000 payments went to employees earning less than $20,000 in annual salary. The employees earning between $20,000 and $30,000 received payments of $20,000 and $25,000. The employee receiving $35,000 had an annual salary of about $35,000. The four payments for less than $10,000 did not show much correlation to the employees' salaries. However, in no case did we find an analysis of the projected costs of litigation.

If these cases had proceeded to final arbitration, the arbitrator could not have awarded these kinds of payments. Rather, arbitrators may award backpay for lost wages only when concluding that the discharge was not for just cause and the state must reinstate the employee. If the arbitrator had ruled that the discharge was for just cause, then the employee would have been dismissed outright. Thus, we sense that for these ten settlements the state simply wanted to discharge undesirable employees. As such, it did not want to run the risk of an arbitrator deciding to reinstate the employees. Thus, for these transactions, the state essentially bought out the employees' position rights.

The argument that the state is saving money is unconvincing because arbitrators cannot award personal injury damages. In order to claim such damages, employees would have to file litigation.

Employment Termination Settlements

Recommendation

- *The state should avoid making payments for personal injuries or damages when settling grievances. If the state believes it will prevail and receive a favorable arbitration decision, then it should defend the case vigorously and not make a settlement payment.*

Arbitration Decisions

Eighteen cases proceeded to final arbitration decisions. The arbitrator upheld discharges in nine cases and ordered the state to reinstate the other nine employees. The state has appealed one reinstatement order to the Minnesota Supreme Court. Chapter 1 provides a more in-depth analysis of arbitration decisions from the past four years. Although we concentrated on the 18 cases involving disputed discharges during the 15-month period, our observations were reinforced by earlier cases.

For the most part, we found that arbitrators make thoughtful, fair decisions. The arbitration process has been an effective means to resolve disputes between the state and its employees. When the employing agencies maintained good work environments and conducted thorough personnel investigations, arbitrators generally upheld the state's decision to discharge an employee. Whenever the employing agency conducted a flawed investigation or did not produce convincing evidence, arbitrators ruled in favor of the employees and ordered reinstatement. Also, if employing agencies enforced work rules inconsistently or untimely, the state's case was damaged.

6. The state should take advantage of the lessons learned from arbitration decisions.

Our analysis revealed that arbitrators used a consistent pattern of criteria to support their decisions. In many respects, arbitrators adhere to standards common to the judicial process, such as the quality of evidence. Other considerations relate to the specific circumstances of the grieving employee, and the employing agency's relationship with that employee. But we also found that arbitrators considered the general work environment at the employing agency, and often considered how the employing agency treated other employees besides the grievant.

The most important consideration was whether the state produced convincing evidence. Clearly, the state carried the burden of proof in the arbitration hearings. Whenever the arbitrator found significant flaws in the state's investigation or considered its evidence to be insufficient, the state lost the case. We found some examples where the employing agency potentially could have strengthened its case by using other investigative resources. For example, we found one case where the employing agency produced circumstantial evidence that an employee had stolen state property. The arbitrator concluded that although the evidence pointed to the employee as a prime suspect, it was not sufficient to justify discharging

the employee. Perhaps, this agency could have prevailed in its case if it had sought outside investigative assistance. The Department of Employee Relations has identified a pool of investigative staff available throughout state government.

Once the state produces convincing evidence, arbitrators tend to assess the specific circumstances of the grievant. The state must demonstrate that it has given the employee a fair chance. Arbitrators expect the state to help employees correct performance deficiencies before initiating discharge proceedings. In cases where the state's discharge decision was upheld, it often demonstrated diligent, but unsuccessful, efforts to improve the employee's performance. The state was most successful when it could show an orderly progressive process of addressing the employee's performance problems.

On occasion, arbitrators have shown some sympathy to grievants who blame personal problems for their misbehavior. Union representatives sometimes cite the employee's personal problems, such as emotional disorders, financial insolvency, or chemical dependency, as part of their case. In these cases, arbitrators may expect that the state has helped the employee resolve any personal problems before initiating efforts to terminate the employment relationship.

Finally, we found that arbitrators often considered the employing agency's general work environment. They ask: Did the employing agency clearly communicate work rules to employees? Were these rules enforced consistently and promptly? The state's case was weakened whenever the union representatives could show that the employing agency had granted exceptions to the rules or had ignored infractions.

Recommendations

- *State agencies must conduct personnel investigations in a manner which will produce sufficient and competent evidence. Evidence should be evaluated prior to proceeding with disciplinary action. Agencies should use the expertise of the Department of Employee Relations' investigative pool.*

- *State agencies should treat employees fairly when performance deficiencies are identified. When possible, agencies should attempt to resolve performance problems before initiating discharge proceedings.*

- *State agencies must consistently and promptly enforce appropriate work rules. Agencies must strive to maintain a quality work environment which treats all employees fairly.*

7. The Legislature should consider identifying certain behavior as constituting just cause for discharging employees.

Some forms of employee misconduct are so egregious that immediate discharge is justified. Furthermore, there are some positions which require such a high degree of public trust that harsher disciplinary standards may be justified compared to other positions. Unless state law identifies some conditions as "just cause" for discharging an employee, arbitrators have no guidance for their decisions.

Minn. Stat. Section 43A.33 pertains to employee grievances. It permits disciplinary action only under circumstances which qualify as just cause. It provides the following definition:

> ...just cause includes, but is not limited to, consistent failure to perform assigned duties, substandard performance, insubordination, and serious violation of written policies and procedures, provided the policies and procedures are applied in a uniform, nondiscriminatory manner.

The statute does not offer much guidance for distinguishing between different levels of discipline. For example, it does not identify what acts constitute just cause for suspensions, versus those acts which justify discharge. The statute elaborates on a definition of what actions by an employee would constitute "abuse" toward residents of state hospitals or nursing homes. Although "abuse" is defined, the statute does not indicate whether it constitutes just cause for disciplinary action. We did observe cases where arbitrators ruled that discharge was justified when state employees committed such acts of "abuse." However, that determination was left to the judgment of the arbitrator.

The Legislature should identify which forms of misconduct justify discharge, as opposed to less harsh disciplinary actions, such as suspensions or reprimands. In particular we believe that "just cause" for discharge should include criminal acts which involve abuse of vulnerable adults, theft of public property, misappropriation of state funds, or presenting or allowing a false claim against the state. Employees who have committed such acts have failed to uphold the public trust extended to state employees. We are aware that other actions also must be considered if a "just cause" standard is to be defined in state law. Clearly, this matter will require careful and thorough legislative consideration.

Finally, there are some positions which require such a high degree of public trust that harsher disciplinary standards may be justified compared to other positions. In addition to employees responsible for providing care in state hospitals and nursing homes, we are concerned with positions which are intended to assure the financial integrity of state programs. Employees such as auditors and tax examiners have a special responsibility to ensure that the public's interest is preserved. However, we found cases where arbitrators failed to enforce vigorous standards of integrity on these employees. In two cases, arbitrators were not convinced by the state's argument that the highest standards of integrity were required of this type of employee. In both cases, the employees had either filed false claims or had not

been completely honest with the employing agency, yet they were reinstated to positions which required them to uphold the public trust. The reinstatements make it difficult for these agencies to preserve their credibility.

Recommendation

- *The Legislature should consider making Minn. Stat. Section 43A.33 more specific in its definition of "just cause" for employee discipline. It should consider identifying some employee actions as justification for discharge, such as abusing residents of state hospitals and nursing homes or committing a criminal act which violates the public trust.*

Chapter 3. Data Practices Issues

The Minnesota Government Data Practices Act (MGDPA) attempts to balance the public's right to know against individual rights to privacy. Based on our analysis of employee settlement payments, we believe the Act is too protective of some data, and unnecessarily withholds useful information from the public. When a settlement is negotiated without any formal proceedings, there is little chance that the public will learn of its existence. Furthermore, we found that settlement agreements typically attempted to control the release of public information so that the nature of disputes would remain secret. In some cases, we found agreements which went to great lengths to direct the employing agency to release positive information about a departing employee.

We are also concerned that state government has used the Act to withhold information related to some high profile personnel investigations which it has conducted. Thus, the public is often not able to assess whether the state has been diligent in conducting personnel investigations.

In general, Minn. Stat. Section 13.43 classifies personnel data as private data. The statute, however, lists the specific information which is to be treated as public data. The list of public data includes fairly basic employment information such as name, salary amount, value of fringe benefits, job descriptions, employment dates, etc. In reference to information about dispute resolution and employee discipline, subdivision 2(9) of the statute makes the following public data:

> ...the existence and status of any complaints or charges against the employee, whether or not the complaint or charge resulted in a disciplinary action; the final disposition of any disciplinary action together with the specific reasons for the action and data documenting the basis of the action, excluding data that would identify confidential sources who are employees of the public body; the terms of any agreement settling administrative or judicial proceedings.

The Department of Employee Relations also referred us to subdivision 2(b) as its basis for treating grievance settlements as private data.

> For the purposes of this subdivision, a final disposition occurs when the state agency, statewide system, or political subdivision makes its final decision about the disciplinary action, regardless of the possibility of any later proceedings or court proceedings. In the case of arbitration proceedings arising under collective bargaining agreements, a final disposition occurs at the conclusion of the arbitration proceedings. Final disposition includes

> a resignation by an individual when the resignation occurs after the final decision of the state agency, statewide system, political subdivision, or arbitrator.

The department interprets the law to mean that data becomes public only when a case results in disciplinary action or proceeds to final arbitration. But data on settlements would remain private.

When we asked the Attorney General about the secrecy associated with most provisions of employment termination settlements, the Attorney General offered us the following observation in a letter dated November 17, 1992:

> Under current law, most information about how state employees perform their work is private personnel data about those employees. When a state employee resigns, perhaps after criticism of his or her work, the performance questions still remain private. Since work performance details are private data and available only to the subject of the data, the details are therefore in some sense "secret."

In response to our question about which information in an employment termination settlement was public data, the Attorney General replied:

> In this case, since the settlement is the basis for added remuneration, it has been our position that that part of the agreement which states the compensation amount is public. The privacy right of the employee, however, keeps other details from being made public. All state employees are afforded this privacy under current state law.

Because we were concerned about our access to the information supporting settlement agreements, we asked about our ability to audit these transactions. The Attorney General offered us the following advice:

> The agreement does not block the normal mechanisms of accountability. Your office is entitled under your statutes to inquire into the spending involved and to be satisfied about its terms. The duties of your office, however, related to making the public aware of the government's spending activities may be restricted by other statutes which operate to protect the individual's privacy. These are two important competing interests which have also troubled the legislature.

We find little comfort in being able to access so much information which we cannot disclose in our audit reports. Thus, we believe the Legislature must consider broadening the definition of personnel data which is public information.

Secrecy provisions included in settlement agreements

We reviewed the provisions of the 14 settlement agreements which required the employee's resignation. The four agreements negotiated directly by state agencies were the most complex and secretive. Because no formal grievances or litigation were filed for these four cases, it is unlikely that the public is even aware of their existence. Of the ten settlements negotiated by the State Labor Negotiator, seven contained some form of confidentiality clause.

8. Employment termination settlements are highly secretive and withhold most information from the public.

Confidentiality clauses are expressly stated in 11 of 14 settlements. Three agreements simply state that the employer agrees to release employment data on the employee, in accordance with the law, but does not cite a specific law. Eight agreements prohibit the parties from initiating or making public statements concerning the terms of the settlement, unless otherwise required by law or a court order (four of the eight specifically cite the Data Practices Act.)

The following clause is a typical example of a confidentiality clause included in a Settlement and Release authorized by the State Labor Negotiator.

> Except as provided under the Minnesota Data Practices Act, the signing parties agree that no public statements or releases shall be initiated or made by any of them, their employees, or agents regarding the terms of this Settlement and Release or any disputed matters pertaining to their employment relationship.

The agreements negotiated directly by state agencies contained more elaborate confidentiality clauses. These agreements typically prohibited adverse comments by either party. The following is an example:

> Nor shall any of the parties comment adversely about any other party hereto concerning any matter or activity arising from or in any manner connected with the employment relationship heretofore existing between the [employee] and the [employing agency].

One agreement negotiated by a state agency contained an even more restrictive "gag order" and extended it to the agency's employees. It says:

> Nor shall [employing agency] or any person acting on their behalf or within their knowledge and control, make any statements or allegations, or

> convey any information which in any way reflects negatively upon the character, personality, or integrity, or performance of [employee] while an employee of the [employing agency], and further, [employing agency] shall instruct their respective employees, officers, and directors involved in this matter to make no such statements or allegations;

Finally, one state agency negotiated an agreement which specifically prohibited conveying relevant information to the media. It says:

> Each of the parties hereto mutually agrees that except as described in this paragraph, none of them shall publicize, make any statement, or convey any information to the media or to any other person, party, or entity (including but not limited to present or former officers, employees or agents of the State of Minnesota or the [employing agency] or other members of the public) about the subject matter of this settlement, the conditions of the settlement, the amount of settlement, the disputes between the parties or the allegations made by any party.

This same agreement specified how the employee could react if certain information was released to the public. It says:

> Finally, the [employing agency] and [employee] agree that in the event the [employing agency] is compelled by law, court order or judicial process to make public information concerning any of the following matters: (1) the subject matter of this settlement, (2) the conditions of this settlement, (3) the amount of this settlement; (4) the disputes between the parties, (5) the allegations made by any party, (6) or some other information about this matter, [employee] may also comment publicly about the same matter or matters the [employing agency] is compelled to disclose except that this provision does not authorize [employee] to disclose information which is classified as non-public or not public under the MGDPA.

We believe these agreements have used extreme measures to ensure the secrecy of their terms. In some cases, the provisions have conflicted with the Minnesota Government Data Practices Act. For example, one agreement forbade disclosing the settlement amount. We believe the Act directs that settlement amounts are public information.

Recommendations

- *Some minimal public disclosure should be required for all settlement agreements. State law should not permit secret agreements to be negotiated with high-level state officials.*

Recommendations (Continued)

- *Confidentiality clauses should be required to reference the Minnesota Government Data Practices Act. The agreements should avoid imposing additional gag orders on the employing agency, particularly when it is required to instruct employees on what they may and may not comment on about the former employee.*

9. In order to gain some employee resignations, the state sometimes agreed to construct positive information about the employee, and destroy adverse information.

Several agreements went beyond simply withholding information. Some directed that data be destroyed, for example unsatisfactory performance reviews. Others required the employing agency to construct data for the employee, for example a letter of recommendation to prospective employers.

We found several "window dressing" mechanisms used to leave the appearance of an amicable departure from state government:

- Filtering negative data on the employment relationship out of the employing agency.
- Paying the employee to resign from one state agency, but allowing (in one case helping seek) employment opportunities with other state agencies.
- Developing a mutually agreed upon letter of recommendation to be made available to future prospective employers.
- Scripting out a response to inquiries that may be received from future prospective employers.
- Staging the resignation to avoid any appearance of a dispute.

We find these practices to be highly objectionable. It strikes us as disingenuous to seek the discharge of an employee on one hand, and with the other to construct positive recommendations for future employers.

Eleven agreements required the employing agency to filter some employment data from the employee's personnel file. Some agreements required the removal of performance appraisals from the employee's personnel file. The following clause is an example of a provision in a Grievance Settlement and Release:

Employment Termination Settlements

> The Employer agrees to remove performance reviews which are less than satisfactory and all documentation related to these performance reviews from the personnel file of the Grievant.

Again, the agreements negotiated directly by state agencies were more detailed. For example, the following clause directed a more extensive control of documentation:

> [Unit of employing agency] will remove any references to the termination of [employee] from the personnel file which is kept at the [unit]. [Unit] will make a prompt, good faith effort to retrieve all copies of documents pertaining to events leading up to [employee's] termination. All records relating to the termination of [employee] shall be kept at [Employing agency's central office]. The records shall be maintained or disposed of, as provided by the [employing agency's] schedule of document retention and disposal. All records relating to [employee's] resignation shall be kept in the personnel file at [unit].

Four agreements barred the employee from applying for future positions with the employing agency, although none of them barred the employee from other positions in state government. As a matter of fact, one agreement required that the employing agency assist the employee in applying to other state agencies.

Three agreements prescribe that the employing agency provide a prescribed letter of reference for the employee to use. A sample of this kind of clause is:

> [Employing agency] and [employee] have agreed upon a letter of reference which [employee] may present to future employers. A copy of that mutually agreed upon letter is attached to this Agreement.

Seven agreements direct how the employing agency will respond to any inquiries received from future prospective employers. Most require that the employing agency only convey simple factual information on the term of employment, positions, and salary. Some specify that only a certain person, such as a personnel director, may respond to such inquiries. Several require that the employing agency mention that the resignation was voluntary. Two agreements require the employing agency to respond to inquiries only in writing.

One agreement was particularly cautious regarding inquiries from future prospective employers.

> Respondents further agree that in the event Respondents are contacted by prospective employers of [employee] or others requesting references or information regarding [employee's] employment at [employing agency], Respondents shall not make any negative or disparaging statements or give any negative or disparaging information regarding [employee]. Respondents shall offer to provide such inquirers the reference letter attached

> hereto as Exhibit _, and they shall provide such inquirers favorable oral references consistent with Exhibit _.
>
> In the event that prospective employers of [employee] make any in-person or on-site visits to [department], at [employee's] request, Respondents shall cooperate with [employee] and use their best efforts to provide a favorable impression of [employee] to such prospective employers during such in-person or on-site visits.

Finally, five agreements specified the terms by which the employee's resignation would be staged. Some simply prescribed the content of the employee's letter of resignation. Others were more elaborate. For example, one agreement contained this language:

> [Employee] and the [employing agency] also agree than when this Agreement becomes effective they may make public the fact that [employee] has resigned from [position] after __ years of service. In addition, in response to inquiries from the public about [employee's] resignation or employment status, they may respond that [employee] and the [employing agency] have discussed the matter, that [employee] has decided to resign and that the [employing agency] thanks [employee] for __ years of service as [employee's position] and wishes [employee] success in future endeavors.

One agreement went to extreme lengths to construct a scenario which provides the illusion of a voluntary resignation. It provided that for a period of time the employee would continue using the office space, equipment and support staff. At the same time, the employee has been stripped of any real decision-making authority. The agreement said:

> [Employee] will voluntarily resign from employment with Respondents as [position], effective [date of approximately one month after settlement date] by a letter substantially in the form of Exhibit __, attached hereto, which will be executed and delivered by [employee] to Respondents upon the execution of this agreement. Until [date], [employee] shall remain as, and retain the title of [position], and no other person shall be appointed by Respondents as [position]. Until [date], the parties hereto shall use their best efforts to maintain the appearance, and do nothing to diminish the appearance, that [employee] remains as [position]. It is understood by the parties hereto, however, that during this period of time until [date], the management affairs of [department] and the administrative duties of the [position] shall be performed by [another employee] appointed by the Respondents. [Employee] will not have authority as [position] to contractually bind or obligate [employing agency], or to incur any debt on behalf of [employing agency], without the prior written approval of Respondents.

Employment Termination Settlements

We fail to see how the state has preserved the public's interest by participating in these "window dressing" exercises. It would be better served by keeping settlement agreements simple and straightforward.

Recommendation

- *When paying employees to resign from state employment, the state should seriously consider the appropriateness of any terms governing the release and control of employment data. It should avoid using mechanisms which falsely portray a healthy employment relationship and an amicable departure.*

Data on Personnel Investigations

In October, 1991, we issued a special review report on an employee appreciation dinner conducted by the Department of Human Rights. The report referenced a Department of Employee Relation's (DOER) investigation into the conduct of former Commissioner Frank Gallegos at the dinner. DOER refused to make its report a public document. The department argued that the report, and its supporting documentation, were protected under the Minnesota Government Data Practices Act. We questioned DOER's interpretation of the state law and asked the Attorney General for advice. The Attorney General supported the DOER position and advised us that the investigative report is not a public document. As suggested by the Attorney General, we also asked DOER whether Mr. Gallegos had been terminated as commissioner because of his involvement with the appreciation dinner. DOER Commissioner Linda Barton responded that Mr. Gallegos was not asked to leave state employment, and that the Governor reluctantly accepted his resignation.

The Attorney General's opinion concluded that the investigative report prepared by the Department of Employee Relations (DOER) was not available for public release. The Attorney General reached this conclusion because the state did not take disciplinary action against the subject of the investigation.

10. We question if the state's decision on disciplinary action is a meaningful legal standard for determining whether the data supporting a personnel investigation should be classified as public data.

We see some practical difficulties with the Attorney General's interpretation of state law. It is particularly troubling in cases where allegations of potential employee misconduct have become public information. If no disciplinary action is taken against employees in these cases, then the state is unable to reveal information about how it resolved the matter. Often, important questions are left unanswered: Were the allegations true? Did the state conduct a complete and thorough investigation? Did the state use appropriate judgment in deciding

not to take disciplinary action? These unanswered questions may cause the public to lose confidence in the integrity of state government.

The Attorney General's interpretation applies only to investigations where the state is acting in its capacity as an employer. Thus, it does not affect the authority of the Legislative Auditor to publish the results of investigations, since our office is not the employer. Rather, we conduct investigations in the role of independent auditor. If our special review had addressed the issues covered by DOER's investigation of former Commissioner Gallegos, then our findings would have become public information. However, our review was limited to the financial arrangements for the dinner, while DOER concentrated on the commissioner's behavior at the event.

Because state law treats our reports differently than Executive Branch investigations, it has become difficult for us to rely on state agencies to investigate some personnel issues. If we think the public has a right to know whether an allegation about a state employee is factual, then we may have to investigate it ourselves. To rely on a state agency investigation runs the risk of nondisclosure, if the agency chooses not to take disciplinary action.

It makes sense that state agencies will not publish false allegations leveled against its employees. However, it also makes sense that the public should be able to evaluate whether state agencies have diligently pursued possible cases of employee misconducted and used good judgment in resolving such cases.

Therefore, we suggest that the Minnesota Government Data Practices Act needs to be modified. We suggest that the standard for public disclosure must be broadened. Minn. Stat. Section 13.43, Subd. 2 makes the following information public already:

- the existence and status of any complaints or charges against employees,
- whether or not the complaint or charge resulted in a disciplinary action, and
- the final disposition of any disciplinary action together with the specific reasons for the action and data documenting the basis of the action, excluding data that would identify confidential sources who are employees of the public body.

Additional information that should be available to the public includes:

- whether allegations of misconduct are substantiated by sufficient evidence,
- the conclusions from investigations into complaints or charges against employees, including the findings of personnel investigations and internal audit reports, and
- the basis for dismissing substantiated complaints or charges against employees.

Employment Termination Settlements

The state should be able to release more information, particularly when allegations of misconduct have been made public or are widely known. The public must be able to ascertain that complaints are investigated thoroughly and fairly by state agencies. Also, agencies must be able to demonstrate that disciplinary actions (or the lack thereof) are appropriate for the circumstances.

Recommendation

- *The Legislature should broaden the public disclosure requirements for personnel investigations.*

Minnesota
Department of
Employee
Relations

Leadership and partnership in human resource management

March 15, 1993

James R. Nobles
Legislative Auditor
Office of the Legislative Auditor

Dear Mr. Nobles:

We have reviewed the Auditor's report on employment termination settlements. We would like to thank you for the opportunity to review this report and offer our comments. Many of the changes we discussed have been incorporated into the document; we concur with the overall accuracy of the report.

We agree with the Auditor's view that M.S. 43A.04 Subd. 6, grants the Department of Employee Relations the authority to negotiate and authorize payments which settle employee grievances. We recognize that in the five instances where settlements were negotiated directly by state agencies, there is some ambiguity regarding the authority to make such settlements. These agreements were negotiated with some assistance from the Attorney General's office. The Attorney General's office has since clarified their role in such negotiations, noting that their signature indicates that they have reviewed the agreements only for form and execution. Because of this clarification, we will advise agencies that any settlement agreements, outside of the context of litigation, must be handled through the Department of Employee Relations. We will also remind agencies that our authority to make settlement payments is specifically limited to formal grievance resolutions.

Finally, we are pleased that you have raised questions about the terms and effects of the Minnesota Government Data Practices Act. We have found the Act to be very complex and extremely difficult to interpret. We welcome a discussion of this statute and hope that such discussions will produce modifications which will make the Act easier to understand and much more simple to administer.

Sincerely,

Linda Barton

Linda Barton
Commissioner

WPPJMP/52

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