



NEBRASKA AUDITOR OF PUBLIC ACCOUNTS

Mike Foley
State Auditor

Mike.Foley@nebraska.gov
P.O. Box 98917

State Capitol, Suite 2303
Lincoln, Nebraska 68509

402-471-2111, FAX 402-471-3301

www.auditors.nebraska.gov

March 25, 2014

Mr. Keith Heier, President
Kenesaw School Board of Education
110 N. 5th Avenue
P.O. Box 129
Kenesaw, NE 68956

Dear Mr. Heier:

Thank you for your March 3, 2014, response to this office's letter of February 10, 2014, regarding the current purchasing arrangement between Kenesaw Public Schools (School) and the Kenesaw Market. Your explanation was very helpful to our understanding of the School's open account with the Kenesaw Market. Additionally, as you promised, we received a letter dated March 14, 2014, from George H. Perry, an attorney with Perry, Guthery, Haase & Gessford, P.C., L.L.O, arguing for the legality of the open account.

As explained in our previous communication, the Auditor of Public Accounts (APA) questions the propriety of the open account due to the fact that the School's Superintendent, Robby Thompson, and his wife are the co-owners of the Kenesaw Market. When first contacting you about this concern, we raised the possibility that the School's purchasing arrangement with the Kenesaw Market might conflict with Neb. Rev. Stat. § 49-14,102 (Reissue 2010). The information provided by both you and Mr. Perry appears to validate our doubts as to the permissibility of the School's open account with the Kenesaw Market.

Our initial letter explained that the Nebraska Political Accountability and Disclosure Act, which is set out at Neb. Rev. Stat. §§ 49-1401 to 49-14,141 (Reissue 2010, Cum. Supp. 2012, Supp. 2013), places quite exacting restrictions upon any contract between a business associated with a public official or public employee and a government body. Specifically, § 49-14,102(1) (Reissue 2010) states:

Except as otherwise provided by law, no public official or public employee, a member of that individual's immediate family, or business with which the individual is associated shall enter into a contract valued at two thousand dollars or more, in any one year, with a government body unless the contract is awarded through an open and public process.

Section 49-14,102(2) provides guidance as to the meaning of "an open and public process," as follows:

For purposes of this section, an open and public process includes prior public notice and subsequent availability for public inspection during the regular office hours of the contracting government body of the proposals considered and the contract awarded.

The applicability of § 49-14,102(1) to the School's open account with the Kenesaw Market is evident. To start, § 49-1442 (Reissue 2010) of the Nebraska Political Accountability and Disclosure Act defines a "public employee" as "an employee of the state or a political

subdivision thereof.” The status of a Nebraska school district as a political subdivision of the State is well established.¹ Additionally, § 49-1408 (Reissue 2010) defines a “business with which the individual is associated” to include a business in which “the individual is a partner, limited liability company member, director, or officer[.]” Finally, “a school district” is expressly designated as a “government body” under § 49-1424 (Reissue 2010).

It is clear that Superintendent Thompson, the School, and the Kenesaw Market fall squarely within the respective statutory definitions relevant to § 49-14,102(1). Moreover, nearly three dozen purchases, totaling \$17,815.83, were made by the School from Kenesaw Market during 2013. Four of those purchases exceeded the \$2,000 threshold established under § 49-14,102(1). The following illustrates those purchases.

Purchase Date	Amount
9/9/2013	\$2,022.41
10/14/2013	\$3,330.57
11/11/2013	\$4,139.36
12/9/2013	\$2,276.65

Thus, as Mr. Perry’s letter appears to acknowledge, the School’s open account with the Kenesaw Market necessitates compliance with § 49-14,102(1).

Your letter emphasizes the importance that the School places upon doing business with local vendors. In fact, you state, “The school district has tried to maintain the position that we try to buy local with all of the businesses in town.” Elaborating upon this important point, you explain further:

It is also true that alternative grocery vendors may be available at lower prices. However, none of those alternatives are available locally. I would also like to add that none of those alternatives gives scholarships to local students, donates to the prom, and advertises in the band calendar, athletic calendar or in the annual. None of the alternatives employ local patrons or pay local taxes that support our school.

While appreciative of the community spirit displayed by the School, the present concern is solely whether the School has complied with § 49-14,102(1).²

According to Mr. Perry’s letter, such compliance was accomplished by a meeting of the School Board on March 10, 2014. Mr. Perry explained:

At the Board’s March 10, 2014 board meeting, the subject of the open account with Kenesaw Market was addressed. The topic of the open account was publicized in the notice for the meeting. Action was taken in open session to approve the open account. That action places the school district in compliance with Neb. Rev. Stat. § 49-14,102. If you would like, I can send you a number of Accountability and Disclosure opinions to this effect.

The actions described by Mr. Perry might appear, at first glance, to indicate conformity with the “open and public process” requirement. As pointed out by the Commission in Advisory Opinion 87 (Feb. 7, 1986):

¹ *Wilder v. Grant County School Dist. No. 0001*, 265 Neb. 742, 658 N.W.2d 923 (2003); *Cline v. School Dist. No. 32 of Scotts Bluff County, Neb.*, 476 F.Supp. 868 (D.Neb. 1979); Op. Att’y Gen. No. 3 (Jan. 14, 1981); Op. Att’y Gen. No. 96065 (Aug. 22, 1996).

² Neb. Rev. Stat. § 84-304(9) (Supp. 2013) directs the APA to “conduct all audits and examinations . . . in accordance with the standards for audits of governmental organizations, programs, activities, and functions published by the Comptroller General of the United States[.]” Section 2.07(a) of *Government Auditing Standards* (2011 Revision) requires us to examine, among other things, “compliance with provisions of laws, regulations, contracts, and grant agreements that have a material effect on the financial statements.” We adhere to this directive whether performing an actual financial audit or, as in the present case, merely reporting upon the findings of a pre-audit inquiry.

The Commission has held that Section 49-14,102 does not require public bidding. It does require however, that the contract be awarded in an "open and public process", which would include giving public notice prior to awarding the contract Additionally, we have taken the position that an action in proceedings conducted pursuant to the Public Meetings Act, Sections 84-1408 R.R.S., et seq., would qualify as an action taken in an open and public process as required in Section 49-14,102.

In light of the particular circumstances presented here, however, both the contents of Advisory Opinion 87 and the plain language of § 49-14,102(2) appear to challenge the validity of Mr. Perry's conclusion.

It is asserted that the School Board's actions on March 10, 2014, were sufficient to satisfy the requirements of § 49-14,102(1) for purchases made in 2013. Such cannot be the case, as those statutory provisions are not applicable retroactively. Section 49-14,102(2) clearly requires that "prior public notice" be given of the contract:

For purposes of this section, an open and public process includes prior public notice and subsequent availability for public inspection during the regular office hours of the contracting government body of the proposals considered and the contract awarded.

(Emphasis added.) As quoted above, moreover, Advisory Opinion 87 also emphasizes that the requisite public notice must take place "prior to awarding the contract."

We appreciate the fact that the School Board, with the guidance of Mr. Perry, has sought to take appropriate measures to ensure compliance with § 49-14,102(1) from this point forward. For at least a year prior to that remedial action, however, such compliance was lacking with regard to the School's open account with the Kenesaw Market.

Because the APA does not have jurisdiction regarding legal matters, we are referring this matter and information to the Nebraska Accountability and Disclosure Commission for possible further review.

If you have any questions regarding the above information, please contact our office.

Sincerely,



Mary Avery
SAE Manager / Finance Manager

.cc Frank Daley, Director, Nebraska Accountability and Disclosure Commission

Enclosures: February 10, 2014, APA Letter; March 3, 2014, Board President Letter; and March 14, 2014, School Legal Counsel Letter



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www.auditors.state.ne.us

February 10, 2014

Keith Heier, President
Kenesaw School Board of Education
110 N. 5th Avenue
PO Box 129
Kenesaw, NE 68956

Dear Mr. Heier:

As you may know, the Nebraska Auditor of Public Accounts (APA) has a toll-free number and an email address for Nebraskans to raise issues – anonymously, if they wish – about possible waste, mismanagement, or fraud within government. In connection with this, we help to provide accurate information to taxpayers and attempt to address concerns about governmental finances. We try to do this in a timely manner, believing this to be a valuable service to the State's citizens.

Recently, this office received an inquiry regarding the Kenesaw Public Schools (School) and its dealings with the Kenesaw Market. It is our understanding that the School's Superintendent, Mr. Robby Thompson, and his wife are the owners of the Kenesaw Market. It was also brought to our attention that the Kenesaw Market might be used even though alternative grocery vendors provide the same goods for a lower price and that the use of the Kenesaw Market was discussed publicly in a board meeting. Our understanding is that School employees have been told by the Superintendent that they should buy all they can from the Kenesaw Market, so as to keep it profitable and remaining in Kenesaw, even if it costs the School more money.

This relationship gives rise to some concern regarding Neb. Rev. Stat. § 49-14,102 of the Nebraska Political Accountability and Disclosure Act, which states:

Except as otherwise provided by law, no public official or public employee, a member of that individual's immediate family, or business with which the individual is associated shall enter into a contract valued at two thousand dollars or more, in any one year, with a government body unless the contract is awarded through an open and public process. (Emphasis added.)

Under this statutory language, the Superintendent would qualify as a "public employee," the School would be considered the "government body," and the Board agreeing to make payments for goods or services could be considered as entering "into a contract."

In conducting limited preliminary planning work to determine if a full financial audit or attestation is warranted, we ask the School provide the following information:

- 1) All amounts paid to the Kenesaw Market for calendar year 2013. This information should come directly from the School's accounting system and should be provided electronically in a Microsoft excel compatible worksheet, if possible.
- 2) All amounts paid to other food vendors for calendar year 2013. Again, this information should come directly from the School's accounting system and should be provided electronically in a Microsoft excel compatible worksheet, if possible.
- 3) Any contracts or bid documents related to payments made to the above-referenced food vendors.
- 4) All Board meeting minutes from calendar year 2013, including the details of the reported claims paid.
- 5) Are any School Board members an owner of the Kenesaw Market?

Thank you in advance for your cooperation. The information requested can be sent electronically to my email address: mary.avery@nebraska.gov . If you have any questions regarding this request for information, please let us know.

Sincerely,



Mary Avery
Special Audits and Evaluations Manager
Auditor of Public Accounts
Room 2303, State Capitol
Lincoln, NE 68509
Phone 402-471-3686
mary.avery@nebraska.gov

.cc Robby Thompson, Superintendent

March 3, 2014

Mary Avery, Special Audits and Evaluations Manager
Auditor of Public Accounts
Room 2303, State Capitol
Lincoln NE 68509



Dear Mary,

I apologize for the slow response to your letter dated February 10, 2014. The letter was received at the school just after the February board meeting and as is always the case, the letter was set aside to be delivered to me with the next month's board agenda. Virtually all of the mail sent to me by way of the school is "junk" and is in no way in need of immediate response. I also don't know if that is what you intended, but Mr. Thompson's copy of the letter was enclosed with my original letter so I can attest that he had no idea that a letter from you existed until you called on Friday. Rest assured we take this matter very seriously.

I would like to take this opportunity to address some of the concerns listed in the letter. First, it is true that Robby and Tammy Thompson are the owners of the Kenesaw Market, LLC. It is also true that alternative grocery vendors may be available at lower prices. However, none of those alternatives are available locally. I would also like to add that none of those alternatives gives scholarships to local students, donates to the prom, and advertises in the band calendar, athletic calendar or in the annual. None of the alternatives employ local patrons or pay local taxes that support our school.

The school district has tried to maintain the position that we try to buy local with all of the businesses in town. The school purchases its insurance with a local agency. The vehicle fuel is purchased at the local convenience store. All of our tires are purchased at the local co-op station. We are probably one of the few schools in the state that uses a local photographer for school pictures. Lawn mowers and vehicles are purchased locally, with the exception of buses which are not available locally. Vehicle and bus repairs are done locally whenever possible.

It is true that the Kenesaw Market has been discussed publically at board meetings. The discussions have generally related to the fact that as board president and as a local business owner (who does not currently have any business dealings with the school or the Thompson's), that I felt that it is extremely important that all local businesses be supported to the greatest extent possible. I strongly believe that a strong business community leads to a strong community and consequently a strong school system. In these discussions, Mr. Thompson has either remained silent or I have asked him to leave the room.

I cannot speak to what school employees may have been told, because like you, I was not present at those conversations. What I can tell you is that the anonymous information and your understanding based upon that information is very inconsistent with my face to face conversations with Mr. Thompson and with how we as a board have tried to operate. For example, Mr. Thompson shared with me that an employee became upset with him when he told her that she needed to try to purchase her supplies locally, if possible. In the past she has apparently driven to send Sam's Club in Grand Island to purchase her supplies and submitted a bill for mileage. The total bill to the school district from Kenesaw Market for these supplies was approximately \$180.

As far as the legal issues are concerned, we will have our attorney, Greg Perry of the Perry Law Firm of Lincoln, Nebraska, submit a separate response to you, along with the documents you have requested. I anticipate that Mr. Perry will get a response to you shortly after our next Board meeting, which will be held on March 10th.

We, as a board, have tried to conduct our business in a manner that is most beneficial to the school and to the community and to be good citizens of this community. If we are forced to purchase from vendors outside of Kenesaw based strictly based on cost, or for any other reason for that matter, this policy would go against what we feel is best for the school and the community. Any such policy, strictly enforced, would be very destructive to our small town, not just to the grocery store but to many businesses in town.

I am hopeful that common sense will prevail here and that the school will continue to be allowed to support our local businesses. I am also hopeful that the "concerned citizen" can see the benefits of doing business locally regardless of who the owners are or any personal grudges that they may hold.

Thank you for your time.

Sincerely,

A handwritten signature in black ink, appearing to read "Keith Heier", written in a cursive style.

Keith D Heier
Board President

John M. Guthery
Thomas M. Haase
James B. Gessford
Rex R. Schultze***
Daniel F. Kaplan
Gregory H. Perry
Joseph F. Bachmann*
R. J. Shortridge*
Jeanette Stull
Corey L. Stull*
Joshua J. Schauer*
Shawn P. Dontigney
Derek A. Aldridge**
Justin J. Knight



Of Counsel
Richard D. Sievers

*Also admitted in Iowa
**Also admitted in Kansas
***Also admitted in Wyoming

PERRY, GUTHERY, HAASE & GESSFORD, P.C., L.L.O.

Ernest B. Perry (1876-1962)
Arthur E. Perry (1910-1982)
R. R. Perry (1917-1999)
Edwin C. Perry (1931-2012)

March 14, 2014

Mary Avery
Special Audits and Evaluations Manager
Auditor of Public Accounts
Room 2303, State Capitol
Lincoln, NE 68509

Dear Ms. Avery,

We represent Kenesaw Public Schools and are responding to your letter of February 10, 2014.

Attached is a disk containing the documents responsive to your document requests. In answer to Number 5: No school board member is an owner of the Kenesaw Market.

At the Board's March 10, 2014 board meeting, the subject of the open account with the Kenesaw Market was addressed. The topic of the open account was publicized in the notice for the meeting. Action was taken in open session to approve the open account. That action places the School District in compliance with Neb. Rev. Stat. § 49-14,102. If you would like, I can send you a number of Accountability and Disclosure Commission opinions to this effect.

Also at the Board's March 10, 2014 board meeting, the school board resolved an open account involving a business in which a board member has an interest.

I have attached the meeting notice, proof of publication, and minutes for the March 10 meeting, along with a conflicts statement related to the open account related to the board member.

I appreciate your drawing this matter to our attention so we can adjust practices to increase transparency.

Sincerely,

PERRY, GUTHERY, HAASE
& GESSFORD, P.C., L.L.O.


Gregory H. Perry

Enclosure