



NEBRASKA AUDITOR OF PUBLIC ACCOUNTS

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August 3, 2017

Thomas Wolfgang, Board Chair
Village of Hershey
205 West 1st Street
P.O. Box 353
Hershey, NE 69143

Dear Mr. Wolfgang:

As you know, the Nebraska Auditor of Public Accounts (APA) has an anonymous hotline telephone number and email address for Nebraskans to raise issues about possible waste, mismanagement, or fraud within government. In connection with this, we help to provide accurate information to taxpayers and attempt to correct misperceptions about government. We try to do so in a timely manner, believing this to be a valuable service to the State's citizens.

Recently, the APA received concerns regarding certain financial transactions at the Village of Hershey (Village). As a result, the APA began limited preliminary planning work to determine if a full financial audit or attestation would be warranted. Pursuant thereto, the APA requested certain information regarding the Village's financial transactions or compliance matters.

Based upon the outcome of this preliminary planning work, the APA has determined that a separate financial audit or attestation of the Village is unnecessary at this time. However, during the course of the preliminary planning work, we noted certain internal control or compliance matters, or other operational matters within the Village, that are presented below. The following information, along with the related recommendations, will provide the Village an opportunity to improve internal controls and overall financial operations.

Our consideration of internal control was for the limited purpose described above, and it was not designed to identify all deficiencies in internal control that might be material weaknesses or significant deficiencies. Therefore, material weaknesses or significant deficiencies may exist that were not identified.

Comments and Recommendations

1. Open Meetings Act

In March 2017, the Village Maintenance Superintendent was convicted by the Lincoln County Court of driving under the influence of alcohol (DUI) in violation of Neb. Rev. Stat § 60-6,196(1) (Reissue 2010). As a result, his driver's license was revoked for a period of six months.

According to a Nebraska Department of Motor Vehicles website, someone with a DUI conviction may, upon meeting specific eligibility requirements, apply for an ignition interlock permit that will allow him or her to drive a specific vehicle.¹ Per court records, an ignition interlock permit was authorized for this case.

The APA received a letter dated June 29, 2017, from the Village Board of Trustees (Board). That letter contained the following information:

On January 17, 2017, during a regular meeting of the Board of Trustees, the Board moved to go into Executive Session to discuss personnel issues. Board members present were Thomas Wolfgang, Loren Johnson and Pete Cullan. As the issues pertained to [REDACTED], he was invited into Executive Session. Also in attendance was Clerk LeAnn Ellis, recording. [REDACTED] offered the use of his personal vehicle in order to continue to do his job while he was required to use a breathalyzer to drive following a DUI conviction. It was agreed during this session that [REDACTED] would be allowed to use his own vehicle for work during that time period. It was a verbal authorization with all three Board members in attendance at that meeting agreeing to as none were willing to have a breathalyzer in a company vehicle and needed [REDACTED] to be able to continue to perform his duties and be available for emergencies. As you know, the Clerk does record these minutes but does not publish them.

As indicated by the above excerpt from the letter to the APA, the Board claims to have given the Village Maintenance Superintendent verbal permission to use his personal vehicle for municipal work. No documentation of that approval is found in the meeting minutes, however. Below is the relevant portion of the minutes from the January 17, 2017, Board meeting:

Next on the agenda: personnel issues. Wolfgang announced that the Board would go into Executive Session to discuss personnel issues. Motion by Johnson, second by Cullan to go into Executive Session to discuss personnel issues. Roll call all ayes, motion carried. Wolfgang once again announced that the Board would go into Executive Session to discuss personnel issues. Motion by Johnson, second by Cullan to come out of Executive Session. Roll call all ayes, motion carried.

By failing to vote on its decision in open session and to document that action in the meeting minutes, the Board appears to have violated the Open Meetings Act (Act).

Set out at Neb. Rev. Stat. §§ 84-1407 to 84-1414 (Reissue 2014, Cum. Supp. 2016, and 2017 Neb. Laws 2017, LB 318, § 1), the Act requires decisions made in executive session to be formalized in open session, which means that such decisions should be recorded in the Board's meeting minutes.

To start, Neb. Rev. Stat. § 84-1410(1) (Reissue 2014) provides, in relevant part, the following:

Any public body may hold a closed session by the affirmative vote of a majority of its voting members if a closed session is clearly necessary for the protection of the public interest or for the prevention of needless injury to the reputation of an individual and if such individual has not requested a public meeting. The subject matter and the reason necessitating the closed session shall be identified in the motion to close.

¹ <https://dmv.nebraska.gov/fr/ignition-interlock-permit>.

While the actual deliberations of the governing body in executive session may remain confidential, any subsequent action in relation thereto must be taken publically. Section 84-1410(2) provides, as is relevant, the following:

The vote to hold a closed session shall be taken in open session. The entire motion, the vote of each member on the question of holding a closed session, and the time when the closed session commenced and concluded shall be recorded in the minutes. If the motion to close passes, then the presiding officer immediately prior to the closed session shall restate on the record the limitation of the subject matter of the closed session. The public body holding such a closed session shall restrict its consideration of matters during the closed portions to only those purposes set forth in the motion to close as the reason for the closed session. The meeting shall be reconvened in open session before any formal action may be taken. For purposes of this section, formal action shall mean a collective decision or a collective commitment or promise to make a decision on any question, motion, proposal, resolution, order, or ordinance or formation of a position or policy . . .

(Emphasis added.) Additionally, Neb. Rev. Stat. § 84-1413(1) (Cum. Supp. 2016) requires the following:

Each public body shall keep minutes of all meetings showing the time, place, members present and absent, and the substance of all matters discussed.

Subsection (2) of that same statute adds, in relevant part, the following:

Any action taken on any question or motion duly moved and seconded shall be by roll call vote of the public body in open session, and the record shall state how each member voted or if the member was absent or not voting . . .

Information provided in the “Outline of Nebraska Open Meetings Act” section of the Nebraska Attorney General’s web page explains how the above statutory provisions are supposed to operate when a public body meets in executive session:

The vote to hold a closed session must be taken in open session, and the entire closed session motion, the vote of each member on the question of holding a closed session, and the time when the closed session commences and ends must be recorded in the minutes. If the motion to close passes, then the presiding officer shall restate on the record immediately prior to the closed session the limitation of the subject matter of the closed session. The public body holding a closed session shall restrict its consideration of matters during the closed session to only those purposes set forth in the motion to close as the reason for the closed session. The meeting must be reconvened in open session before any formal action may be taken, and "formal action" in that context is defined in § 84-1410(2) to mean a collective decision or a collective commitment or promise to make a decision on any question, motion, proposal, resolution, order, or ordinance or formation of a position or policy.²

Referencing Op. Att’y Gen. No. 89063 (October 12, 1989), that same web page also offers the following guidance:

A public body can go into a proper closed session for discussion of personnel matters and then reconvene for a public vote with no lengthy explanation of the rationale underlying the decision.

In light of all of the above, it seems apparent that the Board’s meeting minutes should have reflected a formal vote on the record, taken after reconvening in open session, to permit the Village Maintenance Superintendent to use his personal vehicle for municipal work. Although the various details and concerns leading to that action need not have been revealed, a public vote should have been taken and duly recorded nonetheless.

² <https://ago.nebraska.gov/open-meetings>.

We recommend the Village Board ensure compliance with all relevant provisions of the Open Meetings Act, including the requirement that formal action be taken in open session and recorded in the meeting minutes. Because a violation of State law may have occurred, we are forwarding this information to the Nebraska Attorney General and the Lincoln County Attorney for further review.

Village Response: The Village of Hershey acknowledges that the Board of Trustees may have avoided this issue had they taken formal action after coming out of Executive Session on the decision to allow our Maintenance Superintendent to drive his personal vehicle for work during the time that he was required to use an ignition interlock device. Under normal circumstances, our attorney would have been in attendance to assist us in better handling this closed session issue. We do attempt to conduct our business openly. Going forward, the Board will be more diligent in making certain that the public is able to observe us conduct all of our business.

2. Gas Purchases

Village employees purchase gas from the local Kwik Stop convenience store in Hershey, NE. A charge account has been set up with that establishment, allowing amounts charged to be billed later to the Village on a monthly basis. However, it has been noted that the Village Maintenance Superintendant has been permitted to fill up his personal vehicle – which, as discussed in the previous comment, he was informally authorized to drive for municipal business – using the Village charge account.

The following table provides a summary of Village gas purchases from the local Kwik Stop between September 2016 and May 2017:

Month	Maintenance Superintendent		Other	
	Gallons	Price	Gallons	Price
September 2016	150.286	\$334.15	83.406	\$183.53
October 2016	90.377	\$195.35	43.420	\$92.62
November 2016	108.107	\$232.10	0.000	\$0.00
December 2016	107.084	\$236.12	55.138	\$118.00
January 2017	28.103	\$66.85	76.713	\$175.00
February 2017	80.902	\$182.59	12.428	\$28.45
March 2017	30.617	\$70.85	0.000	\$0.00
April 2017	113.637	\$258.95	53.775	\$124.22
May 2017	83.917	\$190.29	151.494	\$341.97
Totals	793.030	\$1,767.25	476.374	\$1,063.79

As explained in the previous comment, the Village Maintenance Superintendent had his driver's license revoked for six months beginning on March 9, 2017. The Kwik Stop receipts shown in the table below are those that were signed by the Maintenance Superintendent after that revocation went into effect:

Date of Receipt	Gallons	Price	Reason
3/10/2017	8.465	\$19.80	Loader
3/17/2017	3.195	\$7.35	Truckster
3/31/2017	6.478	\$14.70	Compost Site
3/31/2017	2.113	\$4.75	Compost Site
4/1/2017	15.339	\$34.50	P.U. (Pickup)
4/2/2017	11.018	\$25.00	Loader
4/5/2017	5.424	\$12.20	Mower
4/7/2017	15.118	\$34.00	My P.U. (Pickup)
4/11/2017	5.772	\$13.15	Gas Can
4/12/2017	18.033	\$41.10	P.U. (Pickup) & Gas Can
4/14/2017	2.002	\$4.56	Gas Can
4/17/2017	10.544	\$25.19	Gas Can
4/19/2017	15.250	\$34.75	P.U. (Pickup)
4/24/2017	15.137	\$34.50	P.U. (Pickup) – Ron’s
5/1/2017	10.987	\$25.04	Gas Cans
5/2/2017	15.795	\$36.00	P.U. (Pickup)
5/8/2017	16.373	\$36.00	P.U. (Pickup) – Truckster
5/12/2017	17.835	\$41.00	P.U. (Pickup)
5/25/2017	19.944	\$45.45	P.U. (Pickup)
5/30/2017	2.983	\$6.80	Truckster
Totals	217.805	\$495.84	

*The Village Maintenance Superintendent also purchased brake fluid for the dump truck on 4/26/2017.

The APA verified on the Department of Motor Vehicle’s database that the Village Maintenance Superintendent does own a pickup that is titled and registered in Lincoln County.

The Village lacks adequate control over its gas purchases when the Village Maintenance Superintendent is allowed to fill his personal vehicle using the Kwik Stop charge account. The personal vehicle would most likely be driven for more than simply municipal business, and it would be difficult to track the different usages, or even to differentiate between them, without a very detailed log.

A more reliable and easily verifiable method of meeting the Village Maintenance Superintendent’s fuel needs for Village business purposes would be to require him to record his mileage for work and then to reimburse him in accordance with the allowable Internal Revenue Service mileage rate.

We recommend the Village revoke the Maintenance Superintendent’s authority to purchase gas for his personal vehicle using the Kwik Stop charge account. Instead, we recommend the Village reimburse the Maintenance Superintendent for municipal business travel costs using the allowable Internal Revenue Service mileage rate.

Village Response: The Village of Hershey agrees that the Maintenance Superintendent’s authority to purchase gas for his personal vehicle, while using the Village charge account, should be revoked. The Village also agrees that any mileage reimbursement payable to him should be made using the allowable Internal Revenue Service standard mileage rate.

The gas purchase tickets reflecting the purchase of gas for equipment and gas cans were signed by the Maintenance Superintendent, perhaps giving the impression that the superintendent was operating equipment on village streets. However, as he was the only person authorized to sign for gas, he was present not as an operator of equipment, but rather as a passenger in a vehicle or equipment operated by an assistant.

3. Use of Village Vehicles

From March 2017 to the present, the Village Maintenance Superintendent appears to have been operating motorized equipment or vehicles other than his own automobile. Such motorized equipment or vehicles belonged to the Village and included a pickup, dump truck, truckster, tractor, backhoe, grader, Bobcat skid-steer loader, and a John Deere mini excavator.³ Under current State law, however, the Village Maintenance Superintendent would be prohibited from operating any motor vehicle not equipped with an ignition interlock device.

Neb. Rev. Stat. § 60-6,211.05(1) (Cum. Supp. 2016) states, in relevant part, the following:

If an order is granted under section 60-6,196 . . . the court may order that the defendant install an ignition interlock device of a type approved by the Director of Motor Vehicles on each motor vehicle operated by the defendant during the period of revocation.

(Emphasis added.) As discussed in Comment 1 (“Open Meetings Act”) herein, the Village Maintenance Superintendent was convicted in March 2017 of driving under the influence of alcohol in violation of Neb. Rev. Stat § 60-6,196(1) (Reissue 2010). Punished with a six-month revocation of his driver’s license, he was subsequently authorized to install an ignition interlock device on his personal automobile, which allowed him to drive that vehicle.

For purposes of the above-referenced statutes, Neb. Rev. Stat. § 60-638 (Cum. Supp. 2016) defines “motor vehicle” as “every self-propelled land vehicle, not operated upon rails, except bicycles, mopeds, self-propelled chairs used by persons who are disabled, and electric personal assistive mobility devices.”

Based upon this information, it appears that the Village Maintenance Superintendent should not have been operating the Village equipment and vehicles specified above – all of which fall within the definition of “motor vehicle” provided in § 60-638.

Neb. Rev. Stat. § 60-6,211.11 (Cum. Supp. 2016) states, in relevant part, the following:

(1) Except as provided in subsection (2) of this section, any person ordered by a court or the Department of Motor Vehicles to operate only motor vehicles equipped with an ignition interlock device is guilty of a Class I misdemeanor if he or she (a) tampers with or circumvents and then operates a motor vehicle equipped with an ignition interlock device installed under the court order or Department of Motor Vehicles order while the order is in effect or (b) operates a motor vehicle which is not equipped with an ignition interlock device in violation of the court order or Department of Motor Vehicles order.

(2) Any person ordered by a court or the Department of Motor Vehicles to operate only motor vehicles equipped with an ignition interlock device is guilty of a Class IV felony if he or she (a)(i) tampers with or circumvents and then operates a motor vehicle equipped with an ignition interlock device installed under

³ A “loader” is heavy machinery used in construction to move or load materials, and a “truckster” is a piece of equipment that looks similar to a golf cart and is used to transport materials.

the court order or Department of Motor Vehicles order while the order is in effect or (ii) operates a motor vehicle which is not equipped with an ignition interlock device in violation of the court order or Department of Motor Vehicles order and (b) operates the motor vehicle as described in subdivision (a)(i) or (ii) of this subsection when he or she has a concentration of two-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood or a concentration of two-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath.

In addition to serious statutory concerns, possible liability issues may arise from permitting the Maintenance Superintendent not only to drive his personal vehicle for municipal business but also to operate motorized Village equipment or vehicles while his driver's license is revoked.

Good internal controls require adequate procedures to monitor and govern the use of any motorized equipment or vehicle – whether belonging to the Village or otherwise – operated by a Village employee for municipal purposes. Such procedures should both ensure employee compliance with all applicable State statutes and minimize any liability risks for the Village by, among other things, ensuring that all such motorized equipment or vehicles are covered under the Village's insurance policy.

We recommend the Village implement procedures to ensure that its employees, including the Maintenance Superintendent, are fully compliant with State statute when operating motorized equipment or vehicles – whether belonging to the Village or otherwise – for municipal purposes. We further recommend the procedures minimize any liability risks for the Village by, among other things, ensuring that all motorized equipment or vehicles operated by employees for municipal purposes are covered under the Village's insurance policy. Because a violation of State law may have occurred, we are forwarding this information to the Nebraska Attorney General and the Lincoln County Attorney for further review.

Village Response: Your letter expresses concern that the Maintenance Superintendent was operating equipment that was not equipped with ignition interlock. The Village of Hershey did inquire of a Lincoln County Deputy Sheriff about the extent to which the Maintenance Superintendent could operate equipment, and were advised that he was prohibited from driving anything on any Village street. The Maintenance Superintendent's operation of equipment was restricted to operation on Village property only. The Maintenance Superintendent did not operate any type of vehicle or piece of equipment on Village streets during the period which he was prohibited from driving without ignition interlock.

We would also point out that we were in communication with our insurance carrier and that they were aware of the restrictions placed on the Maintenance Superintendent and we did follow their advice relating to his driving. Our insurance carrier did reiterate that he could not drive on any Village streets in any Village vehicles or equipment.

The Village of Hershey realizes their mistakes and will, in the future, work to ensure compliance in all areas discussed in this letter through legal counsel and personal research.

Thank you again for this opportunity to respond. We sincerely have only the best interests of the Village of Hershey and its residents in mind and we appreciate you providing us with this information that will improve internal controls and overall financial operations for the Village of Hershey.

* * * * *

The preliminary planning work that resulted in this letter was designed primarily on a test basis and, therefore, may not bring to light all existing weaknesses in the Village's policies or procedures. Nevertheless, our objective is to use the knowledge gained during the performance of that preliminary planning work to make comments and recommendations that we hope will prove useful to the Village.

Draft copies of this letter were furnished to the Village to provide its management with an opportunity to review and to respond to the comments and recommendations contained herein. All formal responses received have been incorporated into this letter. Responses have been objectively evaluated and recognized, as appropriate, in the letter. Responses that indicated corrective action has been taken were not verified at this time.

This communication is intended solely for the information and use of the Village and its management. It is not intended to be, and should not be, used by anyone other than those specified parties. However, this letter is a matter of public record, and its distribution is not limited.

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

Sincerely,

A handwritten signature in cursive script that reads "Mary Avery".

Mary Avery
Special Audits and Finance Manager
Phone 402-471-3686
mary.avery@nebraska.gov

cc: Nebraska Attorney General
Lincoln County Attorney