



## NEBRASKA AUDITOR OF PUBLIC ACCOUNTS

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June 3, 2020

Aaron Fintel, Chairman  
Village of Fairmont Board of Trustees  
635 6<sup>th</sup> Avenue  
Fairmont, NE 68354

Dear Mr. Fintel:

As you may know, the Nebraska Auditor of Public Accounts (APA) received certain financial and compliance concerns regarding the Village of Fairmont (Village). In response, the APA began limited preliminary planning work to determine if a full financial audit or attestation would be warranted. Pursuant thereto, the APA requested from the Village pertinent financial or compliance information.

Based upon a review of the information provided, the APA has determined that a separate financial audit or attestation of the Village is unnecessary at this time. Nevertheless, during the course of the preliminary planning work, we noted an issue that merits corrective action, as presented below.

### **Comment and Recommendation**

The Village appears to have failed both to maintain adequate records of Family Medical Leave Act (FMLA) leave used by one of its employees and to comply with its own Employee Handbook regarding the accrual of leave benefits for municipal personnel.

29 CFR 825.500 contains recordkeeping requirements under the FMLA. Specifically, subsection (c)(2) of that regulation requires employers to maintain records that disclose the following:

*Dates FMLA leave is taken by FLMA eligible employees (e.g., available from time records, requests for leave, etc., if so designated). Leave must be designated in records as FMLA leave; leave so designated may not include leave required under State law or an employer plan which is not also covered by FMLA.*

The Village's Employee Handbook, which is dated January 23, 2019, contains provisions related to vacation and sick leave benefits. Section 303 addresses the Village's vacation leave benefits, and Section 307 describes the Village's sick leave benefits. Both sections define eligible employees as regular full-time employees. Section 201 defines a regular full-time employee as follows:

*REGULAR FULL-TIME employees are those who are not in a temporary or introductory status and who are regularly scheduled to work no less than 40 hours per week . . . .*

The Village provided leave benefits to an employee who was not entitled to them, as the employee was not working 40 hours per week. The FLMA leave for the individual in question ended on October 15, 2019, and the individual did not return to work on a full-time basis, according to the Board Chair. The Village failed to correct the records from that period through the current date.

The following timeline details the APA's correspondence with the Village related to the matter:

On April 13, 2020, the APA contacted the Village's Board Chair with several questions about the processing of employee payroll, employee benefits, and the 12<sup>th</sup> Avenue sewer project. Two days later, the Board Chair provided a response to the APA's questions. The information provided raised a number of additional questions concerning the approval of employees' time worked and the benefits provided to employees. The APA sent a follow-up email to the Board Chair on April 16, 2020.

The Village provided further information on April 21, 2020. Still with unanswered questions, the APA phoned the Board Chair on April 23, 2020. In that phone call, the Board Chair confirmed that a Village employee had taken FMLA leave.

The APA followed that phone call with an email containing more questions. On April 27, 2020, the Board Chair provided additional information. The APA contacted the Village's auditor, Meirau & Co., P.C., with questions on April 28, 2020. On May 1, the Village's auditor provided a response. On May 4, 2020, the APA sent additional questions to the Village.

On May 14, 2020, the Board Chair confirmed that the 12-week FMLA leave occurred from July 23, 2019, to October 15, 2019, and that Mierau & Co., P.C., was to determine whether the Village had paid the individual correctly. On May 15, 2020, Mierau & Co., P.C., informed the APA that it was asked by the Village to cease direct communications with our office regarding the Village, as the Village had not granted it authority to release anything further to the APA.

Without procedures to ensure that adequate records are maintained for FMLA leave used, and Village benefits are provided only to eligible employees, there is an increased risk for not only violation of Federal regulations but also misuse of Village funds.

We recommend the Village implement procedures to ensure adequate records of FMLA leave used are maintained, and only eligible employees receive Village benefits.

*Village Response: I disagree with the conclusions contained in the draft letter. The letter states that "The Village provided leave benefits to an employee who was not entitled to them, as the employee was not working 40 hours per week." This statement is not correct. I provided information to Ms. Janssen to show that the employee in question was in fact a full-time employee of the Village and that she was granted FMLA leave after she provided documentation to the Village of a very serious medical condition. This employee was a valued long-time employee of the Village and she was entitled to be granted leave as provided by the FMLA and the Village Employee Handbook. All of this information was provided to Ms. Janssen.*

*The letter also states that the Village appears to have failed to maintain adequate records of the FMLA leave used by one of its employees. This statement is also incorrect. I have provided Ms. Janssen with the FMLA records for the employee in question which show that the Village granted FMLA leave to the employee from July 23, 2019 to October 15, 2019. These FMLA leave records are contained in the Village personnel records and, as stated, were provided to Ms. Janssen. There is no basis for the conclusion that the Village has not maintained adequate records of FMLA leave used by one of its employees.*

*The Village has attempted to treat the employee in question fairly and to provide the employee with all benefits that they are entitled to pursuant to federal law and Village policies. We have further attempted to comply with all of the information requests from your Office, and will continue to safeguard public funds and continue to provide the benefits to the Village employees that they are entitled to receive.*

**APA Response: In its response to the APA's draft letter sent on May 20, 2020, the Village disagreed with our conclusion therein that inadequate records had been maintained to document the FMLA leave taken by one municipal employee. Subsequently, the APA had a telephone conversation with the Board Chair on May 28, 2020, during which we explained further the basis for our determination regarding the Village's insufficient documentation. According to legal guidance received by the Village, the Board Chair countered, there is no requirement to keep such records – indicating, it would seem, that such information was not created or retained.**

On May 29, 2020, the APA sent an email message to the Board Chair reiterating our stance on the need to document FMLA leave taken by municipal employees. In that message, we pointed to 29 CFR § 825.500, one of many Federal regulations governing the FMLA. Pursuant thereto, employers must “make, keep, and preserve records pertaining to their obligations under the Act [FMLA] in accordance with the recordkeeping requirements of section 11(c) of the Fair Labor Standards Act (FLSA) . . . .” For the implementation of section 11(c) of the FLSA, 29 CFR § 516.2 requires the maintenance of records reflecting the hours worked each workday and workweek by a covered employee.

In his June 1, 2020, response to that message, the Board Chair did not dispute the accuracy of the citations provided. Rather, he offered a completely different argument, claiming instead that unspecified Federal and State confidentiality requirements prevented the Village from disclosing the time-keeping records sought. The Board chair ended his response by writing, “Based on these concerns I have to decline to provide a further response to you beyond what I have already submitted on behalf of the Village of Fairmont.” Interestingly, however, the Board Chair had previously permitted the APA to review the Village’s actual FMLA records, as opposed to the more general employee time records now at issue.

In stark contrast to this entirely new contention by the Village, both Federal regulation and State law authorize the APA to examine records documenting the days and hours worked by municipal employees. Under the FMLA, for instance, 29 CFR § 825.500(g) – which incorporates by reference the Americans with Disabilities Act of 1990 (ADA) – contains the following:

*(3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.*

Likewise, for the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the following language is found at 42 U.S.C. § 1320d-7(c):

*Nothing in this part shall limit the ability of a State to require a health plan to report, or to provide access to, information for management audits, financial audits, program monitoring and evaluation, facility licensure or certification, or individual licensure or certification.*

(Emphasis added.) A Federal regulation governing HIPAA, 45 CFR § 160.203(d), adds that the general preemption rule does not apply under the following circumstance:

*The provision of State law requires a health plan to report, or to provide access to, information for the purpose of management audits, financial audits, program monitoring and evaluation, or the licensure or certification of facilities or individuals.*

(Emphasis added.) Neb. Rev. Stat. § 84-305 (Supp. 2019) grants the APA broad authority to access records of a public entity, as follows:

*(1) The Auditor of Public Accounts shall have access to any and all information and records, confidential or otherwise, of any public entity, in whatever form or mode the records may be, unless the auditor is denied such access by federal law or explicitly named and denied such access by state law. If such a law exists, the public entity shall provide the auditor with a written explanation of its inability to produce such information and records and, after reasonable accommodations are made, shall grant the auditor access to all information and records or portions thereof that can legally be reviewed.*

(Emphasis added.) Neb. Rev. Stat. § 84-305.01 (Supp. 2019) adds the following:

*Any person who willfully fails to comply with the provisions of section 84-305 or who otherwise willfully obstructs or hinders the conduct of an audit, examination, or related activity by the Auditor of Public Accounts or who willfully misleads or attempts to mislead any person charged with the duty of conducting such audit, examination, or related activity shall be guilty of a Class II misdemeanor.*

**In summary, the APA must infer from the Village's inconsistent reasons for refusing to provide the requested employee time records that proper documentation was not maintained for the FMLA leave taken. Furthermore, because the employee did not return to work in a full-time capacity – 40 hours or more per week – after using all available FMLA leave, that individual is no longer entitled to earn the leave benefits made available to full-time employees alone under the provisions of the Village's employee handbook.**

**Finally, because of not only the Village's continued noncompliance with a lawful APA records request under § 84-305 but also apparent violation of the record-keeping requirements of the FMLA, we are referring this matter to the Nebraska Attorney General, the Nebraska Department of Labor, and the Fillmore County Attorney.**

\* \* \* \* \*

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.

Draft copies of this letter were furnished to the Village to provide its management with an opportunity to review and to respond to the comment and recommendation contained herein. Any formal response received has been incorporated into the letter.

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

Sincerely,



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