



NEBRASKA AUDITOR OF PUBLIC ACCOUNTS

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May 12, 2021

Mayor Joey Spellerberg
City of Fremont
400 E. Military Avenue
Fremont, NE 68025

RE: Questionable Settlement Agreements

Dear Mayor Spellerberg:

As you may know, concerned citizens have contacted the Nebraska Auditor of Public Accounts (APA) with concerns regarding the propriety of payments made by the City of Fremont (City), pursuant to individual “separation agreements,” to three former municipal employees.

In response to those concerns, 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 financial records from the City. Based upon the outcome of this preliminary planning work, including a review of the information provided, the APA has determined that a separate financial audit or attestation is unnecessary at this time. Nevertheless, we have noted certain internal control or compliance matters that are presented below. The following information is intended to improve internal controls or result in other operational efficiencies.

1. Questionable Basis of Payments

Between 2016 and 2018, the City entered into “separation agreements” with three former municipal employees. The City’s payments to those former employees, pursuant to the terms of the agreements, are summarized in the following table:

Employee	Payment Amount	APA Notes
#1	\$ 244,861.34	The cash payment does not include the value of continued City-paid benefits for medical, dental, or pension.
#2	\$ 117,800.00	The cash payment does not include the value of continued City-paid benefits for health insurance.
#3	\$ 10,000.00	
Total	\$ 372,661.34	

Some additional details regarding the City’s “separation agreements” with each of the former municipal employees are provided below:

- **Employee #1:** Agreed to resign employment effective June 1, 2016, but to use “best efforts, abilities, experience, and talents to assist Fremont” with various unspecified matters. Employee #1 also agreed to release the City from all claims existing at the time of the agreement. In exchange, the City agreed to continue paying Employee #1 “a base salary as severance compensation from June 2, 2016 to

December 5, 2016 according to Fremont’s normal payroll periods in the total gross severance” of \$170,163.73. Employee #1 was also permitted to continue participating “as an active employee in medical, dental, and pension” through December 5, 2016. Finally, Employee #1 received an additional “lump sum severance payment” of \$74,697.61 on or around January 1, 2017.

- **Employee #2:** Agreed to release the City from “all claims, demands and actions, past, present and future . . . arising out of . . . [Employee #2’s] employment with [the City], the termination of that employment, and/or any actions or occurrences taking place up to and including the date of execution of this Agreement.” The agreement set the last date of employment for Employee #2 as December 12, 2017. In exchange, the City agreed to pay the employee a “settlement” of \$117,800.00, plus provide the employee group health insurance through December 31, 2017. The agreement was executed on January 5, 2018.
- **Employee #3:** Agreed to release the City from all claims arising prior to the date of the agreement and to return “all Fremont-owned property” in the employee’s possession. Additionally, the employee agreed to “sever all employment ties with Fremont and . . . not serve Fremont in any future role as an employee.” In exchange, the City agreed to pay the employee a “settlement” of \$10,000, plus place the employee on paid administrative leave through October 16, 2017. The employee was also promised payment for unused vacation and sick leave, allowed “to elect an extension of COBRA related health benefits,” and remained “fully vested in the Fremont retirement plan.” Further, the City agreed “to classify Employee’s end of employment with Fremont as a resignation from employment and . . . not to contest Employee’s Unemployment Claim.”

On March 1, 2021, in response to the concerns received regarding the above payments, the APA sent an email message to Mr. Brian Newton, the City Administrator, requesting copies of the three “separation agreements” at issue. Responding on the City’s behalf, Mr. Travis Jacott, an attorney with Adams & Sullivan, P.C., L.L.O, a law firm based in Papillon, Nebraska, provided those documents to the APA on March 4, 2021.

On March 11, 2021, after having reviewed the three “separation agreements,” the APA contacted Mr. Newton again by email. (*See Attachment A hereto for an edited copy of the APA’s communication.*) In that message, the APA asked specific questions about – as well as requested supporting documentation for – each of the agreements. Most particularly, the APA stressed the importance of obtaining documentary confirmation for the underlying legality of the payments made pursuant to those agreements.

As the APA explained to Mr. Newton, Article III, § 19, of the Nebraska Constitution prohibits the State from making payments for which nothing is received in return. That constitutional provision says, in relevant part, the following:

The Legislature shall never grant any extra compensation to any public officer, agent, or servant after the services have been rendered nor to any contractor after the contract has been entered into, except that retirement benefits of retired public officers and employees may be adjusted to reflect changes in the cost of living and wage levels that have occurred subsequent to the date of retirement.

According to the Nebraska Attorney General (Attorney General), “[T]he purpose of state constitutional provisions such as Art. III, § 19 which prohibit extra compensation to public employees after services are rendered is to prevent payments in the nature of gratuities for past services.” Op. Att’y Gen. No. 95063 (Aug. 9, 1995). “Therefore,” the Attorney General has concluded, “Art. III, § 19 is intended to prohibit the payment of gratuities by the State.” Id.

Article III, § 19, has a special application to “separation agreements” between public entities, including the City, and their employees. The Attorney General has explained the pertinence of that constitutional prohibition against gratuities to such remunerative arrangements – emphasizing the distinction between a permissible “settlement” based upon a mutual exchange and an impermissibly gratuitous “severance” involving a unilateral outlay by the public entity – as follows:

With this rule in mind, it becomes apparent that a payment to a state employee upon his or her termination for which the state receives nothing would constitute a gratuity forbidden by Art. III, § 19. For example, if a state employee voluntarily retires after 50 years of service and receives a payment of \$ 25,000 solely for his long and faithful service,

such a payment could be characterized as a gratuity and would clearly be improper. Similarly, if an employee voluntarily resigns in a situation where there is no controversy and receives a payment from the State which is actually a “severance,” such a payment would be improper. On the other hand, a payment to a state employee upon termination as a result of the legitimate “settlement” of a personnel matter which includes the resolution of potential litigation and/or the resolution of difficult personnel problems involving actual legal disputes is not a gratuity since the State would receive something for its money, e.g., a release from potential liability and closure of legal disputes which impaired the ability of the state agency to function.

(Emphasis added.) *Id.* Consequently, the City must have received some tangible benefit from the three former employees – in these cases, the resolution of “potential litigation” or “actual legal disputes” – in order for the payments to them under the “separation agreements” at issue to be lawful.

It should be noted that, in a March 2, 2021, email message to the APA, Mr. Jacott acknowledged the important distinction between a permissible “settlement” and an impermissibly gratuitous “severance.” Mr. Jacott stated, “Also just to be clear, the documents sought by your office from the City do not constitute severance agreements and are indeed settlement agreements.”

Nevertheless, that difference is not immediately evident from the language of the three “separation agreements” themselves. In light of the specific guidance offered by the Attorney General’s opinions, which was conveyed in a more general and truncated fashion in the March 11, 2021, communication to Mr. Newton, the APA hoped to obtain documentation that would support the necessity – and, therefore, the legality as well – of the payments made under the three “separation agreements.” That information was not forthcoming, however.

On April 9, 2021, almost a month after having requested supporting documentation for the need to make the payments under the three “separation agreements,” the APA received a letter from Mr. Jacott. In addition to providing no compelling supporting documentation, the answers to the questions posed by the APA were not particularly helpful due to their lack of specificity. For instance, they made very general reference to fears of remotely possible claims against the City involving alleged discrimination based upon age, disability, or retaliation; however, there was nothing to indicate either the gravity of those supposedly potential claims or any objective reason for taking them seriously – much less that they merited the payments subsequently made under the three “separation agreements” at issue.

Of particular interest was Mr. Jacott’s response to the following APA question included in the March 11, 2021, message to Mr. Newton:

It is our understanding that [Employee #1, Employee #2, and Employee #3] were all at-will employees – which, if true, raises questions regarding the need to enter into any sort of settlement agreement with them. Please address this concern, as well as provide us with copies of the City’s employment agreements with all three individuals.

Mr. Jacott responded as follows:

There are no known employment agreements with the three referenced individuals. However, Under [sic] Nebraska law public employees have more protections than the usual “at-will” employees in private industry.

The Nebraska Supreme Court has held that pursuant to Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), when a public employer deprives an employee of a property interest in continued employment, constitutional due process requires that the deprivation be preceded by (1) oral or written notice of the charges, (2) an explanation of the employer’s evidence, and (3) an opportunity for the employee to present his or her side of the story. Hickey v. Civil Serv. Comm. of Douglas Cty., 274 Neb. 554, 563, 741 N.W.2d 649, 655 (2007).

Accordingly, each employee at issue was entitled to a public due process hearing prior to termination. In addition, as discussed above [Employee #3] had the option to appeal his termination before the Fremont City Council. Said procedural rights must be followed prior to any litigation taking place. Thus, the City was justified in foregoing the litigation process and reaching the settlement agreements that saved the time, cost, and pressures of trial.

The APA finds the above rationalization for the three “separation agreements” to be unconvincing. To start, Nebraska law does not afford public employees “more protections than the usual ‘at-will’ employees in private industry.” This is evidenced by a careful reading of the two cases referenced in the response.

In the Cleveland Board of Education v. Loudermill case, the U.S. Supreme Court states clearly that property interests in continued employment are not constitutionally inherent; rather, they are the creation of some specific authority. 470 U.S. at 538-539, 105 S. Ct. at 1491, 84 L. Ed. 2d at 501-502. Similarly, in the Hickey v. Civil Serv. Comm. Of Douglas Cty case, the Nebraska Supreme Court notes only that the parties stipulated to the existence of a “protected property interest in his continued employment.” 274 Neb. at 563, 741 N.W.2d at 655. The Court does not elaborate, however, upon the source – statutory, contractual, or otherwise – of that particular property interest.

Saying that a “protected property interest in continued employment” – if it can be shown to exist due to some specific authority – gives rise to certain procedural safeguards is quite different than claiming that all public employees in Nebraska “have more protections than the usual ‘at-will’ employees in private industry.” In fact, a review of relevant case law and Attorney General’s opinions bears out that distinction.

For instance, the U.S. Court of Appeals for the Eighth Circuit has offered the following observation regarding the rights of public employees:

The proper standard of determining whether a public employee has a protected property interest in his public employment is well established. A discharged employee may assert procedural due process rights under the fourteenth amendment of the federal Constitution if he or she establishes that a property interest in the state position existed. A property interest does not exist unless the employee has a “legitimate claim of entitlement” to the public job. The court must look to the contract of employment and to state law to determine if there are any rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Alternatively, a plaintiff may establish a property interest by showing mutually explicit understandings or common practices and agreements derived from the employer-employee relationship which would create a sufficient expectancy of continued employment to merit some due process.

It is also established under Nebraska law that, in the absence of an employment contract for a fixed term, an employee is terminable at will.

(Emphasis added.) Tautfest v. Lincoln, 742 F.2d 477, 480 (8th Cir. 1984) (internal citations omitted). Almost a decade later, the same court reiterated the basics of the above excerpt, noting that a “property interest in employment” must be based upon a “legitimate claim of entitlement,” which typically “arises from statutory or contractual limitations on the employer’s ability to terminate an employee.” Packett v. Stenberg, 969 F.2d 721, 724-725 (8th Cir. 1992).

In Op. Att’y Gen. No. 97002 (Jan. 8, 1997), moreover, the Attorney General opined that Nebraska’s “at will” employment rule applies to government employment. Likewise, in Op. Att’y Gen. No. 95071 (Sept. 13, 1995), the Attorney General responded to an inquiry regarding the propriety of paying an employee of the Nebraska Equal Opportunity Commission \$35,000 upon termination. The Attorney General viewed the payment negatively, based largely upon the at-will status of the former public employee. That same opinion was disapproving of an additional payment of \$12,314.00 to the former NEOC employee for two extra months of “support and consultation” services.

In his April 9, 2021, letter to the APA, Mr. Jacott asserted no statutory, contractual, or other basis for any of the three former City employees’ supposed “property interest in continued employment” – which, as pointed out in the case law and Attorney General’s opinions cited above, is a prerequisite to claiming such an interest.

As noted previously, Mr. Jacott responded to the APA’s request for copies of any employment agreements with the three former City workers, “There are no known employment agreements with the three referenced individuals.” Thus, there appears to have been no contractual basis for claiming that any of the three employees enjoyed a “property interest in continued employment.” The APA is unaware, moreover, of any statutory basis for making such a claim, and Mr. Jacott’s response suggested none. In fact, Neb. Rev. Stat. § 16-308 (Cum. Supp. 2020) allows for appointed municipal officers to be “removed at any time.”

Likewise, Neb. Rev. Stat. § 16-309 (Cum. Supp. 2020) does not guarantee appointed municipal officers a specific term of continued employment, specifying they may be “sooner removed.”

Furthermore, a review of Article 5 (“Appointed and Hired Officials”) of the City’s “Code of Ordinances” (Oct. 29, 2020) indicates that, at least, Employee #1 and Employee #2 – who received the highest payouts under the “separation agreements” at issue – were subject to immediate, uncontested removal. This appears to be supported also by Article 5 (“Discharge and Discipline”) of the City’s “Employee Handbook” (December 2017).

As the Attorney General makes clear in Op. Att’y Gen. No. 95063 (Aug. 9, 1995), the legitimacy of a settlement payment to a former public employee is contingent upon the existence of “actual legal disputes,” not merely administrative convenience, a knee-jerk reaction to baseless threats, or any other consideration that does not involve the reality of potential liability. In Op. Att’y Gen. No. 95071 (Sept. 13, 1995), as referenced previously, the Attorney General clearly looks askance upon mere “recitations . . . as to vaguely described alleged claims.” Nevertheless, as pointed out already, all that the APA received in response to our inquiries regarding the basis for the payments made under the three “separation agreements” were such ambiguous assertions about remotely possible discrimination claims involving age, disability, or retaliation. No written support, such as correspondence with the former employees or, better yet, communications with plaintiff’s attorneys asserting formal claims, was provided. Without such support, there is no way to ascertain whether the basis for the payments to the former employees truly involved the resolution of “potential litigation” or “actual legal disputes,” to quote the Attorney General, or was purely chimerical in nature.

Good internal controls require procedures to ensure that any payment made to a former City employee pursuant to a “separation agreement” is supported by adequate documentation showing that such remuneration is the result of a legitimate “settlement” agreement designed to resolve “potential litigation” or “actual legal disputes.” While necessary in all instances, large payments are in particular need of such documentary support.

Without such procedures, there is an increased risk of not only serious concerns regarding possible violation of Article III, § 19, of the Nebraska Constitution, due to payments that appear either unnecessary or so disproportionately excessive as to be gratuitous in nature, but also loss or misuse of municipal funds.

We recommend the City implement procedures to ensure that any payment made to a former municipal employee pursuant to a “separation agreement” is supported by adequate documentation showing both the actual need for such remuneration and the reasonableness of the amount paid.

2. Lack of Detailed Meeting Minutes

The APA was unable to find complete documented approval for all three of the “separation agreements” at issue, as well as the payments made thereunder, in the City Council’s meeting minutes.

Neb. Rev. Stat. § 16-718 (Cum. Supp. 2020) requires the City Council to approve all payments of public funds. That statute mandates City Council approval for the payment of any claim involving public funds. Such formal authorization, like any other action taken by the City Council, should be documented in the minutes of the meeting during which the vote took place.

Likewise, Neb. Rev. Stat. § 84-713(3) (Reissue 2014) requires any settlement agreement for more than \$50,000 to be made an agenda item on the “next regularly scheduled public meeting” of the municipality’s governing body.

Pursuant to the above statutes, all three of the “separation agreements,” along with the payments made thereunder, should be reflected in the City Council’s meeting minutes. Due to the size of their payments, the agreements with Employee #1 (\$244,861.34) and Employee #2 (\$117,800) fall easily within the requirements of § 84-713(3). Meanwhile, the agreement with Employee #3 would still be subject to § 16-718.

Nevertheless, the City Council’s meeting minutes address only the “separation agreement” with, as well as merely a portion of the payment to, Employee #1.

While reviewing the City Council’s meeting minutes for June 14, 2016, the APA found the following:

Move to accept resignation of [Employee #1]. Moved by Council member Johnson, seconded by Council Member Kuhns to accept resignation of [Employee #1] . . . , and authorize the Mayor to sign a separation agreement on behalf of the City including the payment of six months’ salary equivalent for the release of all potential legal claims, payment is required by the employment contract to include sick leave, vacation leave, salary , and other benefits through December 5, 2016.

Though specifying the “six months’ salary equivalent” (\$170,163.73) and the continuation of various employee benefits, the minutes contain no mention of the additional lump sum payment of \$74,697.61, which was to be made “on or around January 1, 2017.”

Similarly, the minutes for the City Council’s December 12, 2017, meeting acknowledge the resignation of Employee #2; however, nothing is said of either the “separation agreement” or the \$117,500 paid out under it.

The APA found nothing in any of the City Council’s meeting minutes pertaining to the “separation agreement” with, or the \$10,000 payment made to, Employee #3.

In the March 11, 2021, email message to Mr. Newton, the APA asked about the apparently incomplete meeting minutes. (*See **Attachment A hereto for an edited copy of the APA’s communication.***) Mr. Jacott’s April 9, 2021, response said the following:

There are no known documents in the possession of the City responsive to this request at this time. City Council meeting minutes can be found on the City’s website at <http://fremontne.gov>. Investigation is ongoing.

These omissions in the City Council meeting minutes are concerning because they reflect either an uninformed vote – or, worse yet, no vote at all – by the City Council on the agreements and payments or incomplete meeting minutes.

Neb. Rev. Stat. § 84-1413 (Cum. Supp. 2020) of the Open Meetings Act says, in relevant part, the following:

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

(2) 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 . . .

(Emphasis added.) Additionally, good internal controls require procedures to ensure that City Council members are presented with detailed and complete information needed to make informed decisions – particularly with regard to the expenditure of public funds – and the meeting minutes reflect accurately both the “substance” of that information and any subsequent action taken by the governing body.

Without such procedures, there is an increased risk of either the City Council making uninformed decisions or noncompliance with State statute.

We recommend the implementation of procedures to ensure the City Council receives detailed and complete information needed to make informed decisions, and the meeting minutes reflect accurately both the “substance” of that information and any subsequent action taken by the governing body.

3. Failure to Reply Timely to APA Document Request

As discussed previously, on March 11, 2021, the APA requested documentation from Mr. Newton supporting the payments made to three former City employees under the “separation agreements” at issue. (*See **Attachment A hereto for an edited copy of the APA’s communication.***) Mr. Jacott’s response to that request was not received until April 9, 2021, almost a month later.

That delayed response is problematic given not only the simplistic nature of the request – the documents sought, if existing, should have been readily available – but also applicable State law.

Neb. Rev. Stat. § 84-305(2) (Cum. Supp. 2020) requires a specific and immediate response to any APA request for audit documentation. Such response must be made “as soon as is practicable and without delay, but not more than three business days after actual receipt of the request no more than three business days after receipt of the request.” Likewise, all of the materials sought must be provided within “three calendar weeks after actual receipt of such request by any public entity.”

Neb. Rev. Stat. § 84-305.01 (Cum. Supp. 2020) provides a criminal penalty for failure to comply timely and fully with an APA request for audit documentation.

Good internal control requires procedures to ensure timely and full compliance with an APA request for audit documentation.

Without such procedures, there is an increased risk of statutory noncompliance.

We recommend the implementation of procedures to ensure timely and full compliance with any APA request for audit documentation.

City Overall Response:

Loudermill Analysis

Nebraska law provides that administrators and appointed officials must be removed by the Mayor and by a majority vote of the city council. Neb. Rev. Stat. § 16-308. The City of Fremont has adopted this procedure in city code. Sec. 2-501. Such procedure creates the pre-termination opportunity for a hearing before the city council.

Although the City would prefer the APA’s interpretation of Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), any application of the same could expose the City to liability. Loudermill analyzed whether a public employee has a property or liberty right to public employment. The Supreme Court found that indeed “tenured” public employees have a property interest in public employment. Specifically, that property interest is created, and their dimensions are defined, by existing rules or understandings that stem from an independent source, such as state law. Id at 538. However, the Court went on to hold that procedures provided in state law do not define the due process necessary for said property right. Id at 540.

The Court explained that the Due Process Clause provides that certain substantive rights – life, liberty and property, cannot be deprived except pursuant to constitutionally adequate procedures. Id at 541. The categories of substance and procedure are distinct, and “property” cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right is due process. Id.

Even if there is no property right at issue, a public employee has a liberty interest to employment as analyzed in Loudermill. The public employee at issue claimed that a nine-month wait period post termination for a hearing was a deprivation of the employee’s liberty interest. The Court held that the employee’s liberty rights were not violated and that the Due Process Clause requires a hearing “at a meaningful time”, and that such nine-month period was not unreasonable. Id at 547. Although there was no violation found in Loudermill, this reasoning plainly suggests that there is an inherent liberty interest in public employment.

“Lack of Detailed Meeting Minutes”

The agreements were discussed in executive sessions with the City Council and the Mayor. Each and every payment made by the City pursuant to the settlement agreements was approved by the City Council to authorize each payment being made as shown in the minutes. Although the specific settlement agreements were not voted on by the Council, the most important part of said agreements, namely the payments prescribed thereunder, were approved. The votes to approve the payments were informed votes.

There isn't detailed documentation of what occurred in the executive sessions because creating a documented record for privileged communications would create adverse discovery and harm the City's position in litigation. The purpose of the executive session was to protect the public interest and prevent needless injury to the individuals involved. See Neb. Rev. Stat. § 84-1410. Creating a record would defeat the purpose of an executive session.

The City was advised by legal counsel

It should be noted that the City had legal counsel when the settlement agreements were reached and was operating pursuant to legal advice that was provided at the time. [Employee #2] was the City Attorney and represented the City pertaining to the settlement agreements for Employee #1 and Employee #3. The law firm of Woods Aitken LLP represented the City for the agreement reached with Employee #2. The City presumably was advised that it was exposed to liability and that the settlement agreements were necessary. If the City was not advised properly, that is an issue of malpractice for which the city attorney at the time should be responsible for.

Policies of the City

It is now the policy of the City to have all proposed settlement agreements brought before the City Council for a public vote for approval. The City will continue to discuss negotiations and matters of litigation relevant to future agreements in executive session but will not be creating a documented record of such discussions to prevent exposure to opposing parties.

The City has also implemented a procedure to ensure timely and full compliance with any APA request for audit documentation.

APA Response: The response to the APA's inquiry about the at-will status of the three employees focused exclusively upon a supposed "property interest in continued employment." After receiving a copy of the draft letter, the City raised a "liberty interest" concern.

The City's response did not describe what the liberty interest entailed. According to the United States Court of Appeals for the Eighth Circuit, however, "Defaming a governmental employee's reputation, good name, honor, or integrity in connection with terminating the employee, without giving the employee a name-clearing hearing, is a deprivation of the employee's constitutionally protected liberty interest." *Brown v. Simmons*, 478 F.3d 922, 923 (8th Cir. 2007).

The Nebraska Supreme Court has added that "liberty interests come into play" when the termination of a public employee involves disseminating allegations that inhibit finding other employment. *Potter v. Bd. of Regents of the Univ. of Neb.*, 287 Neb. 732, 741-742 (2014). That same opinion explained further, "Neither liberty nor property interests are at stake when an at-will employee loses a job but remains as free as before to seek another." *Id.* at 741.

Additionally, the U.S. Supreme Court has explained that no deprivation of liberty is occasioned by the "discharge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge." *Bishop v. Wood*, 426 U.S. 341, 348 (1976).

Given the City's claim herein that the separation agreements were approved in executive session "to protect the public interest and prevent needless injury to the individuals involved," it is unclear – and the City does not specify – what liberty interests could possibly have been at stake.

As for the remaining City responses, what occurred in the executive sessions is unrelated to the procedural requirements of Neb. Rev. Stat. § 84-1413 (Cum. Supp. 2020) and Neb. Rev. § 84-713(3) (Reissue 2014) were not followed. There were no suggestions that the proceedings of an executive session should be recorded or publicized – only that the meeting minutes reflect accurately any matter upon which the City Council votes in open session.

After a copy of draft letter was sent to the City, the APA received a copy of the Employment Agreement with Employee #1. This occurred over six weeks after the initial request was made for such documentation, and the APA had been informed that none existed. Three separate sections therein (1.2, 2.1, and 2.2) attested to the employee's at-will status. Furthermore, Section 3.1 authorized the employee to receive "an amount equal to sixty (60) days" of salary upon termination. Notwithstanding those provisions, the City gave Employee #1 a "settlement" of six months' salary plus a substantial lump sum payment – totaling close to a quarter of a million dollars.

* * * * *

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 City'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 suggestions that we hope will prove useful to the City.

Draft copies of this letter were furnished to the City 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 City 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.

Audit Staff Working on this Examination:

Craig Kubicek, CPA, CFE – Assistant Deputy Auditor
Lucas Post, CPA – Auditor II

Sincerely,



Mary Avery
Special Audits and Finance Manager
Phone 402-471-3686
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Good Afternoon Brian,

As you may know, the Auditor of Public Accounts (APA) was approached recently regarding three “Separation Agreements” negotiated between the City of Fremont (City) and the following former municipal employees: [Employee #1], [Employee #2], and [Employee #3]. Those who contacted this office expressed concerns regarding both the underlying legality of the three agreements and what they consider to be the exorbitant payments made thereunder.

In response to those concerns, the APA obtained copies of the agreements at issue from Mr. Travis Jacott of Adams & Sullivan, P.C., L.L.O., who has been representing the City in these employment matters. Reviewing the agreements, we noted that [Employee #1] was promised a payment of \$244,861.34 (\$170,163.73 plus \$74,697.61) and benefits through December 5, 2016. [Employee #2] was promised payment of \$ 117,800.00, and [Employee #3] was to receive \$10,000 and be placed on paid administrative leave through October 16, 2017. In exchange for such compensation, the three former employees agreed generally to release all claims – including those arising under any employment agreement or termination thereof – against the City.

The agreements were clearly drafted so as to avoid conflicting with Article III, § 19, of the Nebraska Constitution, which prohibits the State or any of its political subdivisions from making gratuitous payments for which the public entity receives nothing in return. While this is evident from the text of the agreements themselves, the specific nature of the potential claims that the City seeks to avoid is understandably not. Consequently, the APA seeks details about those underlying claims.

In Op. Att’y Gen. No. 94064 (August 22, 1994), the Nebraska Attorney General offers a detailed discussion of permissible settlement agreements involving payments to former public employees. That opinion contains the following:

On the other hand, a payment to a state employee upon termination as a result of the legitimate "settlement" of a personnel matter which includes the resolution of potential litigation and/or the resolution of difficult personnel problems involving actual legal disputes is not a gratuity since the State would receive something for its money, e.g., a release from potential liability and closure of legal disputes which impaired the ability of the state agency to function.

(Emphasis added.) As highlighted above, the Attorney General emphasizes that the settlement must be “legitimate,” aimed at addressing “potential litigation” or “actual legal disputes.” Later in that same opinion, the Attorney General reiterates that a permissible settlement agreement must meet this requirement:

There is at least some potential legal liability for the agency growing out of the termination. This could be based upon the employee's contract rights, upon federal or state statutory rights or upon so-called "liberty interests."

The opinion points also to this important factor:

The settlement amount is not so clearly unreasonable as to constitute a gratuity in and of itself. However, we would caution here that it is very difficult for even experienced attorneys to evaluate the monetary value of a case for settlement purposes under many circumstances.

“Payments after termination which involve legitimate settlements on this basis are, therefore, not a gratuity,” the Nebraska Attorney General concludes, “and would not violate Art. III, § 19 of the Nebraska Constitution. (Emphasis added.)”

In order to assist us in evaluating whether the agreements between the City and [Employee #1], [Employee #2], and [Employee #3] are “legitimate,” per the Nebraska Attorney General’s directive, we would appreciate it very much if you could please describe to us in detail the reasons for those individuals’ respective “separations” from employment with the City, including specifics regarding the nature of any resulting potential legal disputes or liability that induced the City to enter into each of the separation agreements. In particular, we would like to receive copies of all documentation, including any communications between the three parties and the City – or their designated representatives – pertaining to their respective terminations of employment and any claims relating thereto. If any such termination involved a series of events or occurrences, please provide us with copies of all documentation relating to each of those incidents.

It is our understanding that [Employee #1], [Employee #2], and [Employee #3] were all at-will employees – which, if true, raises questions regarding the need to enter into any sort of settlement agreement with them. Please address this concern, as well as provide us with copies of the City’s employment agreements with all three individuals.

Likewise, given the considerable variance between the settlement amounts paid to the three former employees, we would appreciate an explanation – along with copies of any supporting documents – for what the City agreed to pay each of those individuals as a severance. Please describe the basis for those determinations and identify – by providing copies of the relevant documentation – the individuals responsible for making them.

It should be noted that one of the City's former employees, [Employee #1], is now a State employee, working for the Nebraska Department of Veterans' Affairs. If [Employee #1's] separation from employment with the City involved any improprieties, financial or otherwise, it is important that we be made aware of the fact. Please specify whether [Employee #1's] termination of employment was related in any way to impropriety, financial or otherwise, on [Employee #1's] part, providing any documentation relevant thereto. We noted also that the City Council's meeting minutes for June 14, 2016, address the separation agreement including six months salary through December 5, 2016, there was no mention of the \$74,697.61 lump sum severance payment. Could you please tell us whether the City Council approved the \$74,697.61 at a different meeting?

Finally, while reviewing the agreement with [Employee #3], we noted that paragraph 5 ("Voluntary Agreement"/"Effective Date" Defined") therein states the following:

The "Effective Date" of this Agreement shall be on the day of its execution by Employee, [sic] its signature by Fremont's authorized representative.

The agreement was signed and dated by [Employee #3] but not by anyone from the City. Likewise, the date of [Employee #3's] signature is November 2, 2017, despite the fact that, as noted above, part of the City's consideration under the agreement was to place [Employee #3] on paid administrative leave through October 16, 2017, which ended weeks prior to [Employee #3's] signature. Is there another copy of the agreement containing both of the required signature and/or different provisions? Could you please also send us the City Council meeting minutes approving the separation agreement?

We noted also that the City Council's meeting minutes for December 12, 2017, address [Employee #2's] resignation. No mention is made, however, of the separation agreement, and no vote was taken to authorize its execution by the City – which is required under the terms of the agreement. Could you please tell us whether the City Council took a separate vote on the agreement during a different meeting?

We appreciate very much your assistance with this inquiry. Please let us know if you have any questions. Thanks,

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