



NEBRASKA AUDITOR OF PUBLIC ACCOUNTS

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Jerry Smith, Board Chairperson
Village of Hendley
P.O. Box 505
Hendley, NE 68946

Dear Mr. Smith:

As you may know, the Nebraska Auditor of Public Accounts (APA) has received concerns regarding the Village of Hendley's (Village) procurement of fertilizer and resale of that product to local residents. 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 specific financial records and other relevant documentation from the Village. Based on the outcome of this preliminary planning work, the APA has determined that a separate financial audit or attestation is unnecessary at this time.

However, during the course of the preliminary planning work, the APA noted a certain issue that merits corrective action, as presented below.

Comment and Recommendation

Unallowable Resale of Fertilizer

On at least four occasions, the Village has purchased fertilizer and other chemicals from Van Diest Supply Company, an Iowa-based distributor. Those items were purchased using the Village Board (Board) Chairperson's pesticide applicator license, which was issued by the Nebraska Department of Agriculture.

The table below shows the Village's payments to Van Diest Supply Company during the past three years:

Check Number	Check Date	Vendor	Amount	Notes
2406	4/8/2019	Van Diest Supply Co.	\$ 2,804.20	Village records show that this expense was for "Mosquito & weed spray" and charged to the General Fund.
2501	4/13/2020	Van Diest Supply Co.	\$ 3,130.90	Per the invoice, the expense was for 185 bags of lawn fertilizer (20 lb. each), "Dry Iron" soil supplement, and other chemicals.
		Van Diest Supply Co.	\$ 31.50	Per the invoice, the expense was for five bags of lawn fertilizer (20 lb. each).
2585	4/12/2021	Van Diest Supply Co.	\$ 2,352.75	Per the invoice, the expense was for 266 bags of lawn fertilizer (20 lb. each) and herbicide.
Total			\$ 8,319.35	

The Village resold some of the fertilizer to local residents, which was paid directly to the Board Chairperson and then deposited into the Village's bank account. The following table provides a timeline for the Village's bank deposits from the resale of fertilizer from 2019 to 2020:

Year	Amount	Notes
2019	\$ 765.00	Included deposit from Board Chairperson for \$210.
2019	\$ 157.00	
2020	\$ 975.05	
2020	\$ 797.96	Included deposit from Board Chairperson for \$400.
2021	\$ 2,014.00	
Total	\$ 4,709.01	

Per information provided by the Village Clerk (Clerk), the municipality purchases fertilizer and pesticide for various reasons, including spraying for mosquitoes, fertilizing the parks and cemeteries, and reselling to local residents. According to the Clerk, the Village does not realize a profit from the resale of the fertilizer; rather, considering it to be a public service of sorts, the Villages charges the local residents only what it actually paid for the fertilizer. The City provided the following reconciliation for the 2020 amounts received; however, these deposited amounts did not agree to the accounting ledger provided.

2020 Reconciliation for Chemicals – Total \$1,334.01

2020	
Amount Paid for Chemical	\$ 3,130.90
Payments Rec'd	
Van Hooser	\$ 97.80
Daniels	\$ 119.25
Buckingham	\$ 400.00
Paxton	\$ 119.25
McConnell	\$ 238.75
Stagemeyer	\$ 158.96
Smith	\$ 200.00
Total Payments Rec	
	\$ 1,334.01
Amount Paid less Total Payments Rec'd	\$ 1,796.89
Remaining Fertilizer used on Cemetary/Park plus Surge Talpirid and Anvil	
	\$ 1,796.89

2020 Accounting Ledger – Total \$1,773.01

FY 2020 INCOME										
Date	Vendor	Amount	Street Income	County Taxes	Electricity	Interest	Misc.	Total	Monthly Total	Details
46 4/10	Cash	975.05					975.05	975.05		Fertilizer
53 5/19	cash	400.00					400.00	400.00		fertilizer
54 5/19	cash	397.96					397.96	397.96		fertilizer

Regardless, the Nebraska Attorney General (Attorney General) has opined that it is inappropriate for a public entity to purchase goods for the purpose of reselling them to private citizens. In Op. Att’y Gen. No. 107 (May 5, 1983), the Attorney General responded to the following question:

What power has the county board, acting for the county, to convey personal property such as drainage tubes and bridge planks to private citizens of the county, incidental to county business?

The Attorney General responded, “The county does not have such power unless the county will not be using or reordering them in the foreseeable [sic] future.”

To support that conclusion, the Attorney General pointed out that the county lacked the requisite statutory authority to purchase property in order to resell it. Quoting the Nebraska Supreme Court (Court) in *State ex rel. Johnson v. Gage Cty.*, 154 Neb. 822, 826, 49 N.W.2d 672, 675 (1951), the Attorney General noted, “A county in this state is a creature of statute and has no inherent authority.” Though not referenced by the Attorney General, the Court added the following:

It [the county] has only such powers as are expressly conferred upon it by statute, and such as are incidentally indispensable to carry into effect those expressly granted it. A grant of power to a county is strictly construed, and any fair and reasonable doubt of the existence of the power is resolved against the county.

Id. Because Neb. Rev. Stat. § 23-104(1) (2012) authorizes counties to “purchase and hold the real and personal estate necessary for the use of the county,” the Attorney General concluded as follows:

In the final analysis, subsection (1) of Section 23-104 authorizes the county to purchase and hold real and personal estate necessary for the use of the county. In light of the Johnson case, supra, we believe it very clear that purchases in excess of the county’s need in order to have a stock on hand for resale do not constitute an acquisition necessary for the use of the county. Not being authorized to make the acquisition in the first place, the county is likewise not able to sell such items

The same reasoning would appear to apply equally to the Village’s purchasing of fertilizer for resale to local residents. Regarding Nebraska municipalities in general, including villages, the Court has made an almost identical observation about the statutory parameters of their authority:

The rule has long been established in this state that a municipal corporation may exercise only such powers as are expressly granted, those necessarily or fairly implied in or incidental to powers expressly granted, and those essential to the declared objects and purposes of a municipality. Statutes granting powers to municipalities are to be strictly construed, and where doubt exists, such doubt must be resolved against the grant.

Briar W., Inc. v. Lincoln, 206 Neb. 172, 175-176, 291 N.W.2d 730, 732 (1980). Moreover, per Neb. Rev. Stat. § 17-501(3) (Cum. Supp. 2020), both cities of the second class and villages have the power “to acquire and hold real and personal property within or without the limits of the city or village, for the use of the city or village” Like the county addressed by the Attorney General’s opinion, the Village may purchase only those items needed to fulfill its rightful duties and responsibilities. Lacking the authority to stockpile goods not intended for municipal use, therefore, the Village is necessarily precluded from selling such things as well.

In addition to the above statutory concern, the Attorney General addressed the problem of expending public funds for a private purpose, as follows:

To order items of personal property each year with the knowledge that part of them would be sold to private individuals is, however, tantamount to entering into business for the selling of such products. As long ago as Oxnard Beet Sugar Co. v. State, 73 Neb. 57, 102 N.W. 80 (1905), reh’g overruled, 73 Neb. 66, 105 N.W. 716 (1905), it was held that appropriation for the purpose of private business is not a public purpose and, therefore, is unconstitutional.

(Emphasis added.) Elaborating further, the Attorney General offered this quote from the Nebraska Supreme Court in *State ex rel. Beck v. York*, 164 Neb. 223, 231, 82 N.W.2d 269, 274 (1957):

To permit legislation of this character to stand in the face of constitutional prohibitions would constitute a death blow to the private enterprise system and reduce the Constitution to a shambles in so far as its protection of private enterprise is concerned.

The Attorney General finished by observing, “[W]e are unable to find a similar public purpose in a county, in effect, going into competition with private businesses engaged in the retail lumber and culvert business.”

Likewise, there appears to be a similar lack of public purpose in the Village's reselling of fertilizer to local residents – giving rise, therefore, to yet further concerns regarding the propriety of such activity.

Furthermore, the local residents who purchased the fertilizer managed to avoid paying sales taxes on it due to the Village's having used its tax-exempt status while purchasing fertilizer in bulk. Neb. Rev. Stat. § 77-2703(1)(f) (Supp. 2019) provides, in relevant part, the following:

For the purpose of the proper administration of the provisions of the Nebraska Revenue Act of 1967 and to prevent evasion of the retail sales tax, it shall be presumed that all gross receipts are subject to the tax until the contrary is established. The burden of proving that a sale of property is not a sale at retail is upon the person who makes the sale

It should be noted also that the informal resale of the Village's fertilizer gives rise to concerns regarding the opportunity for public officials or employees to attain improper personal gain from such transactions. Neb. Rev. Stat. § 49-14,101.01(2) (Reissue 2010) of the Nebraska Political Accountability and Disclosure Act, which is set out at Neb. Rev. Stat. § 49-1401 et seq. (Reissue 2010, Cum. Supp. 2020), contains the following prohibitions:

(1) A public official or public employee shall not use or authorize the use of his or her public office or any confidential information received through the holding of a public office to obtain financial gain, other than compensation provided by law, for himself or herself, a member of his or her immediate family, or a business with which the individual is associated.

(2) A public official or public employee shall not use or authorize the use of personnel, resources, property, or funds under his or her official care and control other than in accordance with prescribed constitutional, statutory, and regulatory procedures or use such items, other than compensation provided by law, for personal financial gain.

All of the above concerns aside, it should be noted that good internal controls require procedures to ensure that the Village property is acquired and sold only as permitted by law.

Without such procedures, there is an increased risk for not only the loss or misuse of public funds but also significant legal complications.

We recommend the Village implement procedures to ensure that Village property is acquired and sold only as permitted by law.

Village Response: The Village Board apologizes for the mishandling and reselling of fertilizer. We appreciate the time and effort that the State Auditor's Office has put forth in this matter. Going forward, chemicals will ONLY be purchased for village use and not resold to private citizens. The Village Board did not realize they were conducting unlawful business and misusing our Sales Tax-exempt status. Again, we thank you for clarifying this issue with us, and we will continue to improve upon our policies and procedures.

* * * * *

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 suggestions 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. Any formal response received has been incorporated into this letter. Such response has been objectively evaluated and recognized, as appropriate, in the letter. A response that indicates corrective action has been taken was 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.

Audit Staff Working on this Examination:

Craig Kubicek, CPA, CFE – Deputy Auditor

Lucas Post, CPA – Auditor II

Mason Culver – Auditor II

Sincerely,

A handwritten signature in cursive script that reads "Mary Avery". The signature is written in black ink and is positioned to the left of the typed name and title.

Mary Avery

Special Audits and Finance Manager

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