



NEBRASKA AUDITOR OF PUBLIC ACCOUNTS

Charlie Janssen
State Auditor

Charlie.Janssen@nebraska.gov
PO Box 98917
State Capitol, Suite 2303
Lincoln, Nebraska 68509
402-471-2111, FAX 402-471-3301
auditors.nebraska.gov

December 17, 2020

Matt Blomstedt, Commissioner
Nebraska Department of Education
301 Centennial Mall South
PO Box 94987
Lincoln, Nebraska 68509

Dear Commissioner Blomstedt:

In planning and performing our audit of the financial statements of the governmental activities, the business-type activities, the aggregate discretely presented component units, each major fund, and the aggregate remaining fund information of the State of Nebraska (State), as of and for the year ended June 30, 2020, in accordance with auditing standards generally accepted in the United States of America and the standards applicable to financial audits contained in *Government Auditing Standards* issued by the Comptroller General of the United States, we have issued our report thereon dated December 17, 2020. In planning and performing our audit, we considered the State's internal control over financial reporting (internal control) as a basis for designing audit procedures that are appropriate in the circumstances for the purpose of expressing our opinions on the financial statements of the State, but not for the purpose of expressing an opinion on the effectiveness of the State's internal control. Accordingly, we do not express an opinion on the effectiveness of the State's internal control.

In connection with our audit described above, we noted certain internal control or compliance matters related to the activities of the Nebraska Department of Education (Department) or other operational matters that are presented below for your consideration. The comment and recommendation, which has been discussed with the appropriate members of Department management, is intended to improve internal control or result in other operating efficiencies.

A deficiency in internal control exists when the design or operation of a control does not allow management or employees, in the normal course of performing their assigned functions, to prevent, or detect and correct, misstatements on a timely basis. A material weakness is a deficiency, or a combination of deficiencies, in internal control, such that there is a reasonable possibility that a material misstatement of the entity's financial statements will not be prevented, or detected and corrected, on a timely basis.

Our consideration of internal control was for the limited purpose described in the first paragraph and was not designed to identify all deficiencies in internal control that might be material weaknesses. Given these limitations during our audit, we did not identify any deficiencies in internal control that we consider to be material weaknesses. However, material weaknesses may exist that have not been identified.

In addition, we noted other matters involving internal control and its operation that we have reported to management of the Department, pursuant to AICPA Auditing Standards AU-C Section 265B.A17, in a separate early communication letter dated September 11, 2020.

Draft copies of this letter were furnished to the Department to provide management with an opportunity to review and to respond to the comment and recommendation 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, but it will be verified in the next audit.

The following is our comment and recommendation for the year ended June 30, 2020.

Employee Retroactive Pay Rate Increase

For fiscal year 2020, the Auditor of Public Accounts (APA) used the State’s accounting system, EnterpriseOne, to conduct a detailed analysis of the highest-paid State employees.

In doing so, the APA identified one Department employee who received a pay raise during March 2020 from \$67 per hour to \$124 per hour, which amounted to an \$118,182 salary increase. This increase was related to her official duties as Deputy Commissioner of School Improvement and Support Services and additional duties as Director of Schools for the Nebraska Department of Health and Human Services (DHHS) facility-based schools, as set by a six-month contract between the Department and DHHS from March 1, 2020, through August 31, 2020. The facility-based schools included those operated by the Youth Rehabilitation and Treatment Centers (YRTC), the Hastings Regional Center – Juvenile Chemical Dependency Program (JCDP), and the Lincoln Regional Center – Whitehall Campus. To ascertain whether the salary increase was reasonable and allowable, the APA requested a copy of the contract between the Department and DHHS, as well as documentation supporting the authorization and payment of the employee’s salary increase.

The pay rate increase for the Department employee was approved on April 10, 2020, and was applied retroactively for the bi-weekly pay period ended April 10, 2020, on the April 22, 2020, paycheck, resulting in a retroactive pay increase of \$4,545.

The APA received additional documentation from the Department and noted that another Department employee also received a pay raise during March 2020 from \$53 per hour to \$76 per hour, which amounted to a \$47,272 salary increase. Similar to the previous Department employee, the raise was related to this employee’s responsibilities under the six-month contract between the Department and DHHS.

The pay rate increase for the second Department employee was approved on April 10, 2020, and was applied retroactively for the bi-weekly pay period ended April 10, 2020. The additional amount paid on his April 22, 2020, paycheck, as a result of this retroactive pay rate increase, was \$1,818.

Article III, § 19, of the Nebraska Constitution says, in 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.

(Emphasis added.) Addressing the above constitutional provision, the Nebraska Supreme Court (Court) has explained, “A payment of compensation to a public servant constitutes extra compensation whenever there is no legal obligation to pay such compensation.” Myers v. Nebraska Equal Opportunity Com’n, 255 Neb. 156, 163, 582 N.W.2d 362, 367 (1998) (quoting Matter of Mullane v. McKenzie, 269 N.Y. 369, 377, 199 N.E. 624, 627 (1936)).

The Nebraska Attorney General has shed additional light on the prohibition in Article III, § 19, as follows:

[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.

Att’y Gen. No. 95063 (Aug. 9, 1995). In determining whether a violation of Article III, § 19, has occurred, the Court has emphasized the importance of timing in the decision to pay the compensation at issue:

We have said that when the “services” for which compensation is granted are rendered prior to the date on which the terms of compensation are determined, the “benefits awarded are not compensation but are a gratuity.” See Wilson v. Marsh, 162 Neb. 237, 252, 75 N.W.2d 723, 732 (1956). It follows that when the “services” for which compensation is paid are rendered after the date on which the terms of compensation are established, the benefits awarded are not a gratuity.

City of Omaha v. City of Elkhorn, 276 Neb. 70, 83, 752 N.W.2d 137, 147 (2008). In an opinion that is equally applicable to retroactive salary increases, such as those granted to the two Department employees, the Nebraska Attorney General observed that Article III, § 19, would “preclude retroactive benefits or expanding retirement benefits in cases involving the construction of statutes which would retroactively increase retirement benefits or amounts.” Op. Att’y Gen. No. 93047 (June 8, 1993).

In light of the above, the retroactive salary increases, which were both purely discretionary and granted after the employees had already performed the services for which the additional compensation was supposedly being made, appear to have been unconstitutional.

We recommend the Department correct the constitutionally suspect pay increases at issue and implement procedures to ensure that such retroactive payments do not occur in the future.

Department Response: Although we issued a formal salary change letter late in the process, it was a result of the circumstances surrounding the beginning of the COVID19 Pandemic. The Commissioner issued a letter to the affected employee on March 6th, assigning new duties under the contract which had been approved by the State Board earlier that day. This letter identified additional responsibilities both employees were to complete and specifically noted that a subsequent memo documenting the salary adjustment would be issued. Due to the timing of these events occurring on the day we learned of the first COVID case the Commissioners attention and time as well as other key staff quickly became focused on leading schools through the pandemic and not completing this contract in a normal time frame. Although the letters were not issued properly in advance of the March 30th start date the intention and discussion at that time indicates the agreement with both employees were complete. We should have included in our documentation that these agreements were discussed and in place prior to March 30th but the contract wasn’t completed until later due to the COVID19 pandemic.

* * * * *

Our audit procedures are designed primarily on a test basis and, therefore, may not bring to light all weaknesses in policies or procedures that may exist. Our objective is, however, to use our knowledge of the Department and its interaction with other State agencies and administrative departments gained during our work to make comments and suggestions that we hope will be useful to the Department.

This communication is intended solely for the information and use of management, the Governor and State Legislature, others within the Department, Federal awarding agencies, pass-through entities, and management of the State of Nebraska and is not intended to be, and should not be, used by anyone other than the specified parties. However, this communication is a matter of public record, and its distribution is not limited.



Kris Kucera, CPA, CFE
Audit Manager