



NEBRASKA AUDITOR OF PUBLIC ACCOUNTS

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Terry Gurciullo Jr., Chairperson
Village of Maxwell
108 S Pine St.
Maxwell, NE 69151

Dear Chairperson Gurciullo Jr.:

The Nebraska Auditor of Public Accounts (APA) has reviewed the audit waiver request received from the Village of Maxwell (Village) for the fiscal year ending 2021. **That request has been approved.**

While performing, pursuant to Neb. Rev. Stat. § 84-304 (Supp. 2021), the preliminary examination necessary to determine whether the audit waiver should be allowed or further audit work would be required, the APA noted certain internal control or compliance matters, or other operational issues, within the Village.

The following information is intended to improve internal controls or result in other operational efficiencies.

Comments and Recommendations

1. Impermissible Gratuities

During a review of the Village's bank statements, the APA observed a withdrawal of \$400 on December 18, 2020. After further discussion with the Village, it appears that the Village gives their employees an annual Christmas bonus in addition to their regular pay.

The holiday bonus payments at issue constitute gratuities, which appear problematic in light of the following statutory and constitutional considerations.

To start, the APA is unaware of any legal authority for the Village to give employee cash bonuses apart from a valid employment contract or formal policy authorizing extra compensation for additional work to be performed. The Village does not have a policy in regard to annual bonuses for the employees.

More importantly, Article III, § 19, of the Nebraska Constitution contains the following prohibition against gratuitous payments to public employees:

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.

The Nebraska Attorney General (Attorney General) has summarized this constitutional provision by explaining, "Nebraska law generally requires work be performed in order for payment to be received." Op. Att'y Gen. 95071 (Sept. 13, 1995).

According to the Nebraska Supreme Court (Court), this constitutional prohibition is applicable to both the State and its many political subdivisions. *Retired City Civilian Employees Club of City of Omaha v. City of Omaha Employees' Retirement System et al.*, 199 Neb. 507, 512, 260 N.W.2d 472, 475 (1977). Consequently, the Village is subject to the injunction against gratuities.

Discussing the terminology found in Article III, § 19, the 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 Attorney General has shed additional light on the prohibition in Article III, § 19, as follows:

As we stated in Op. Att'y Gen. No. 94064 (August 22, 1994), the 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.

City of Omaha v. City of Elkhorn, 276 Neb. 70, 83, 752 N.W.2d 137, 147 (2008). In another opinion, *Op. Att'y Gen. 95063 (August 9, 1995)*, the Attorney General addressed the potential problem with making a congratulatory payment to a public employee upon his or her retirement:

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.

Op. Att'y Gen. No. 95063 (Aug. 9, 1995). It should be noted that the constitutional prohibition against gratuities does not necessarily apply to certain types of salary adjustments, such as longevity pay granted pursuant to the explicit terms of a valid contractual agreement – which, unlike an impermissible gratuitous bonus, is earned compensation.

The payments at issue here do not appear to constitute such contractual salary adjustments; rather, they are "Christmas" bonuses for which the Village receives no promised or actual future benefit, making them constitutionally suspect.

Good internal control requires procedures to ensure that any payments, including bonuses, to Village employees are made in strict accordance with Article III, § 19.

Without such procedures, there is an increased risk of not only loss or misuse of public funds but also violation of the Nebraska Constitution.

A similar issue was identified by the APA in a prior review and was disclosed to the Village in the APA's letter dated March 2, 2021, which can be found on the APA's website.

We recommend the Village consult with the Village Attorney, County Attorney, or the Nebraska Attorney General regarding the permissibility of the "Christmas" payments addressed in this comment.

2. Payment of Unapproved Claims

During our comparison of the Village's bank account details to claims approved by the Board, the APA identified the following checks, totaling \$11,140.70, which were paid but not included on the claims listing to be approved by the Board.

Details of the unapproved payments are included in the table below:

| Name/Vendor | Check Date | Check # | Amount |
|-----------------------------|------------|---------|---------------------|
| Jim Gushorlese | 7/13/21 | 7487 | \$ 583.55 |
| Intuit | 7/13/21 | ACH | \$ 47.65 |
| Amazon | 7/14/21 | ACH | \$ 50.63 |
| Amazon | 7/14/21 | ACH | \$ 63.29 |
| John Feeney | 7/15/21 | 7510 | \$ 229.59 |
| Monica Breinig | 7/15/21 | 7511 | \$ 702.17 |
| Seth Kucera | 7/15/21 | 7512 | \$ 1,508.22 |
| Commercial Non-Tax Loan | 7/15/21 | ACH | \$ 356.89 |
| USPS | 7/16/21 | ACH | \$ 55.00 |
| Intuit | 7/16/21 | ACH | \$ 2.96 |
| Shraka's Body Shop | 7/20/21 | 7516 | \$ 285.00 |
| Nebraska Secretary of State | 7/20/21 | 7517 | \$ 30.00 |
| Intuit | 7/20/21 | ACH | \$ 10.37 |
| Wal-Mart | 7/20/21 | POS | \$ 21.27 |
| Correction | 7/22/21 | ACH | \$ 359.71 |
| Intuit | 7/22/21 | ACH | \$ 7.30 |
| John Feeney | 7/30/21 | 7513 | \$ 303.91 |
| Monica Breinig | 7/30/21 | 7514 | \$ 670.77 |
| Seth Kucera | 7/30/21 | 7515 | \$ 1,480.59 |
| IRS | 8/2/21 | ACH | \$ 2,416.15 |
| Intuit | 8/3/21 | ACH | \$ 3.18 |
| Intuit | 8/4/21 | ACH | \$ 2.20 |
| Intuit | 8/5/21 | ACH | \$ 10.74 |
| IRS | 8/5/21 | ACH | \$ 1,212.19 |
| Intuit | 8/6/21 | ACH | \$ 3.02 |
| Bankcard | 8/6/21 | ACH | \$ 318.85 |
| NE Dept. of Rev | 8/6/21 | ACH | \$ 401.65 |
| Intuit | 8/9/21 | ACH | \$ 3.85 |
| Total | | | \$ 11,140.70 |

Neb. Rev. Stat. § 17-614(1) (Supp. 2021) sets out the proper method for the appropriation or payment of money by the Village, as follows:

All ordinances and resolutions or orders for the appropriation or payment of money shall require for their passage or adoption the concurrence of a majority of all members elected to the city council in a city of the second class or village board of trustees.

(Emphasis added.) Good internal control requires procedures to ensure that all claims are approved by the Board prior to payment and are adequately documented in the meeting minutes of the month in which they are approved. Without such procedures, there is an increased risk for the loss or misuse of Village funds.

A similar issue was identified by the APA in a prior review and was disclosed to the Village in the APA's letter dated March 2, 2021, which can be found on the APA's website. However, it does not appear this issue was corrected after the APA's notification.

We recommend the Board implement procedures to ensure all claims are approved by the Board prior to payment and are adequately documented in the meeting minutes of the month in which they are approved.

3. Expenditure in Excess of Budget

For the fiscal year ended September 30, 2021, actual expenditures exceeded the adopted budget by \$49,661, which was partly due to the Village not budgeting for the Water and Sewer loans. Also, the Village incurred unexpected repairs on the water tower in the amount of \$32,009. No amended budget was filed with our office for these additional expenditures.

Neb. Rev. Stat. § 13-510 (Reissue 2012) states, in relevant part, the following:

No expenditure during any fiscal year or biennial period shall be made in excess of the amounts indicated in the adopted budget statement, except as authorized in section 13-511, or by state law. Any officer or officers of any governing body who obligates funds contrary to the provisions of this section shall be guilty of a Class V misdemeanor.

Neb. Rev. Stat. § 13-511 (Cum. Supp. 2020) sets out the procedures for amending the adopted budget accordingly.

When expenditures are made in excess of the amounts budgeted with no appropriate budget amendment by the Board to address those excesses, the Village is noncompliant with State statute, further increasing the risk for loss and/or misuse of funds.

A similar issue was identified by the APA in a prior review and was disclosed to the Village in the APA’s letter dated March 2, 2021, which can be found on the APA’s website. However, it does not appear this issue was corrected after the APA’s notification.

We recommend the Board implement procedures for monitoring closely its budget status on an ongoing basis to avoid incurring expenditures in excess of the amount budgeted, amending the budget as necessary to accommodate any unforeseen expenses.

4. Negative Bank Balance

During a review of the bank statements obtained from the Village’s audit waiver request, it was noted that the Village’s checking account had a negative balance for 13 separate days during the year, with the largest negative balance being \$2,754.35 on December 23, 2020, through December 27, 2020. The table below summarizes the negative account balances for those 13 days. Additionally, the Village paid \$140.00 in non-sufficient funds (NSF) charges.

| Date Range | Largest Negative Balance | NSF Fees |
|-----------------------|--------------------------|------------------|
| 12/23/2020 - 12/27/20 | \$ (2,754.35) | \$ - |
| 3/24/2021 | \$ (84.62) | \$ 35.00 |
| 3/30/2021 | \$ (29.47) | \$ 35.00 |
| 4/1/2021 - 4/6/21 | \$ (1,135.75) | \$ 70.00 |
| Total | | \$ 140.00 |

Good internal controls and sound business practices require procedures to ensure sufficient funds are available in the Village’s bank accounts to pay claims.

Without such procedures, there is an increased risk for not only the loss, misuse, or theft of Village funds, but also the accumulation of overdraft fees.

A similar issue was identified by the APA in a prior review and was disclosed to the Village in the APA’s letter dated March 2, 2021, which can be found on the APA’s website. However, it does not appear this issue was corrected after the APA’s notification.

We recommend the Village implement procedures to ensure sufficient funds are available in the Village’s bank accounts to pay claims.

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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.

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, please contact **Dakota Christensen** at **402-499-8702** or **dakota.christensen@nebraska.gov**.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Avery". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Mark Avery, CPA
Assistant Deputy Auditor