



NEBRASKA AUDITOR OF PUBLIC ACCOUNTS

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January 30, 2023

Diane J Sabatka-Rine, Interim Director
Nebraska Department of Correctional Services
PO Box 94661
Lincoln, Nebraska 68509

Dear Ms. Sabatka-Rine:

We have audited the financial statements of the governmental activities, the aggregate discretely presented component units, each major fund (except the Enterprise Fund – Unemployment Insurance), and the aggregate remaining fund information of the State of Nebraska (State), and we were engaged to audit the business-type activities and the Enterprise Fund – Unemployment Insurance, as of and for the year ended June 30, 2022, 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, and we have issued our report thereon dated January 30, 2023. In connection with our engagement to audit the financial statements 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, 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 engagement to audit the financial statements as described above, we noted certain internal control or compliance matters related to the activities of the Nebraska Department of Correctional Services (Department) or other operational matters that are presented below for your consideration. These comments and recommendations, which have been discussed with the appropriate members of the Department's management, are intended to improve internal control or result in other operating efficiencies.

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 or significant deficiencies and, therefore, material weaknesses or significant deficiencies may exist that were not identified. However, as discussed below, we identified a certain deficiency in internal control that we consider to be a significant deficiency.

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. We did not identify any deficiencies in internal control that we consider to be material weaknesses.

A *significant deficiency* is a deficiency, or a combination of deficiencies, in internal control that is less severe than a material weakness, yet important enough to merit attention by those charged with governance. We consider Comment Number 1 (“Lack of Adherence to Legislative Bill and Federal Regulations”) to be a significant deficiency.

That comment will also be reported in the State of Nebraska’s Statewide Single Audit Report Schedule of Findings and Questioned Costs.

Draft copies of this letter were furnished to the Department to provide 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. The responses were not subjected to the other auditing procedures applied in the engagement to audit the financial statements and, accordingly, we express no opinion on them. Responses that indicate corrective action has been taken were not verified at this time, but they will be verified in the next audit.

The following are our comments and recommendations for the year ended June 30, 2022.

1. Lack of Adherence to Legislative Bill and Federal Regulations

On April 7, 2022, the Nebraska Legislature passed LB 1014 (2022), setting out the Governor’s recommendations for appropriating the \$520 million in American Rescue Plan Act of 2021 (“ARPA”) funding received from the Federal government. Signed into law by the Governor on April 13, 2022, that bill contained provisions for the use of State and Local Fiscal Recovery Funds (“SLFRF”), made available through the ARPA grant, to both the State of Nebraska and its various local governmental entities.

As explained by the “Introducer’s Statement of Intent” to LB 1014, the “authorized uses” for the Federal funds being appropriated by that bill fell into “five broad categories.” Among those was “Premium Pay for Essential Workers: Additional support to those workers who bear the greatest health risks with funds eligible retroactive to January 27, 2020.” Section 12 of the legislation specified that the amounts to be appropriated to various State agencies “related to premium pay for Public Health and Public Safety positions as a result of COVID-19 conditions” In particular, the Department of Corrections (NDCS) received a “premium pay” appropriation of \$20,395,464.

In June 2022, NDCS performed journal entries that moved payroll costs of \$20,395,464 from the State General Fund to the Coronavirus State and Local Fiscal Recovery Funds (SLFRF) grant.

On October 6, 2022, the APA requested supporting documentation for those journal entries. The general ledger detail that the NDCS provided on October 21, 2022, included salaries, health insurance, and overtime for certain departments within NDCS. The APA questioned how this complied with either LB 1014 or the SLFRF grant requirements. On November 4, 2022, NDCS presented the APA with documentation replacing the previous support provided in October.

The \$20,395,464 support included \$7,104,968 for an \$8 per hour wage increase for Corrections Corporals and Corrections Sergeants. The remaining \$13,290,496 was for overtime, shift differential, and on-call hours paid for all staff from November 23, 2021, through June 30, 2022, and overtime, shift differential, and on-call hours paid July 1, 2021, thru November 22, 2021, excluding presumptive pay.

The APA also reviewed the detail for the \$7,104,968 premium pay provided by NDCS. We noted that NDCS used \$8 per hour for December through June; however, the \$8 was not effective until December 20, 2021. There was a \$5 increase from December 6, 2021, to December 19, 2021. However, we also noted that NDCS did not include premium pay for Corrections Unit Caseworkers. The NDCS had indicated that those workers should be included. We calculated that additional premium pay totaling \$898,487 could have been charged to SLFRF funds. This still leaves unallowable costs totaling \$12,392,009 (\$20,395,464 less premium pay allowed of \$8,003,455).

NDCS's use of the SLFRF grant for general overtime, shift differential, and on-call hours does not appear to be in accordance with either the language of LB 1014 or the Federal requirements governing the handling of those funds, as found in the "Final Rule" released by the U.S. Department of Treasury on January 6, 2022.

To start, LB 1014, directs the SLFRF funds to be expended specifically for "premium pay." The Federal Rule defines premium pay as "an amount of up to \$13 per hour . . . , in addition to wages or remuneration the eligible worker otherwise receives, for all work performed by the eligible worker during the COVID-19 public health emergency." (Emphasis added.) (pg. 4399) The Final Rule emphasizes that "premium pay should be in addition to compensation typically received." (Emphasis added.) (pg. 4400) The Final Rule explains further that "a recipient may award premium pay to an eligible worker in addition to the overtime pay already earned by the eligible worker . . ." (Emphasis added.) (pg. 4400) Consequently, the premium pay – which, according to the Final Rule, may "be thought of as hazard pay by another name" (pg. 4397) – made available through the SLFRF grant must augment any type of regular remuneration, including overtime pay, not constitute it. As made clear by the supporting documentation provided, however, NDCS did not use the SLFRF monies for such purely augmentative purposes.

In addition to noting the apparent failure to comply with the "premium pay" directive contained in LB 1014, the APA became concerned that NDCS's use of the SLFRF grant monies may have been in further violation of the Final Rule. According to the Final Rule, the SLFRF allocation "may be used for payroll and covered benefits for public safety, public health, health care, human services, and similar employees of a recipient government, for the portion of the employee's time that is spent responding to COVID-19." (Emphasis added.) (pg. 4384) Despite this clear admonition, the APA found no indication that NDCS had restricted its disbursement of SLFRF monies accordingly.

When the APA raised questions about the allowability of the journal entries for purposes of both LB 1014 and the SLFRF, the Deputy Director of NDCS responded with the following:

All public safety workers are presumed to have worked in a COVID capacity. The Nebraska Department of Correctional Services (NDCS) has nine facilities housing over 5500 incarcerated individuals. Starting April 4, 2020, NDCS had significant numbers of incarcerated individuals and staff members test positive for COVID-19 within its facilities. Activities within this project related to providing a level of staffing necessary during the COVID-19 Pandemic to maintain a safe and secure environment within NDCS facilities.

It was necessary for NDCS to maintain staffing levels that would allow the agency to mitigate the threat of COVID-19 and its impact on staff, inmates and the public. Mandatory overtime was necessary for a majority of staff, especially those who had direct contact with inmates, including those who provided medical/mental health, food service and other services to inmates, as well as those who oversaw administrative and support roles. NDCS has an extensive and complex staff structure, many of whom have interrelated duties. For example, custody staff partner with social workers, nurses, unit and case workers as well as others to ensure the safe operation of each facility. In addition, there are housekeeping, maintenance, and food service workers responsible for providing basic needs to inmates. Priority is given to those with the most direct contact with incarcerated individuals, as well as those supporting their efforts.

As a result of COVI-19, many staff members working extended overtime to maintain critical staff levels at the facilities. The resulting stress led to staff burnout and acerbated personnel turnover. These funds helped stabilize the workforce, reduce training costs and enabled the agency to continue staffing critical posts.

A reduction in COVID, plus negotiated staff pay increases in the fall of 2021, has enabled NDCS to fill many vacancies. Recruitment has stabilized and has included bringing on workers from other states.

The SLRF Final rule provides the following:

- *Page 4384, (a): 'funds may be used for payroll and covered benefits for public safety...for the portion of the employee's time that is spent responding to COVID-19. For administrative convenience, the recipient may consider public health safety employees to be entirely devoted to responding to COVID-19 , and therefore their full payroll and covered benefits eligible to be covered, if the employee, or his or her operating unit or division,*

is “primarily dedicated” to responding to COVID-19, meaning that more than half of the employee, unit or division’s time is dedicated to responding to COVID-19.’

- COVID conditions resulted in significant vacancies in NDCS’ facilities. Overtime was the method for which the most critical posts could be staffed in order to maintain safe and secure operations. Without overtime, inmate, staff and public safety could not be maintained.
- As indicated, many staff members worked extended overtime to maintain critical and safe staff levels at all of its facilities. This included all available staff as necessary, including custody, unit, food service, medical and all other areas as required to provide staffing. For example, staffing levels at TSCI at times required the Warden to work 3rd shift to provide critical staffing. All staff members, custody and non-custody, on duty were expected and required to respond to staffing requirements caused by COVID. The overtime required crossed shifts and facilities, depending on the staffing requirements necessitated by COVID-19.
- Shift differential applies to hours, including overtime hours, worked on the applicable shift. Again, all staff members on duty were expected to respond, as necessitated by COVID.

The above NDCS response to the APA’s inquiry begins by stating, “All public safety workers are presumed to have worked in a COVID capacity.” According to the Final Rule, however, such a determination must be based upon a periodic documented assessment showing that any individual employee(s) or unit/division receiving SLFRF payments has been “primarily dedicated” to responding to COVID-19. An unsubstantiated presumption or baseless generalization, such as that upon which NDCS appears to rely, is insufficient to meet this requirement.

Set out at length below is language in the Final Rule (pg. 4384) requiring a periodic documented assessment to support that SLFRF payments are being made to those “primarily dedicated” to responding to COVID-19:

Under the interim final rule, funds may be used for payroll and covered benefits for public safety . . . of a recipient government, for the portion of the employee’s time that is spent responding to COVID-19. For administrative convenience, the recipient may consider public health and safety employees to be entirely devoted to responding to COVID-19, and therefore their full payroll and covered benefits eligible to be covered, if the employee, or his or her operating unit or division, is “primarily dedicated” to responding to COVID-19, meaning that more than half of the employee, unit, or division’s time is dedicated to responding to COVID-19. Recipients may consider other presumptions for assessing the extent to which an employee, division, or operating unit is responding to COVID-19. Recipients must periodically reassess their determination and maintain records to support their assessment, such as payroll records, attestations from supervisors or staff, or regular work product or correspondence; recipients need not track staff hours.

* * * *

In the final rule Treasury is maintaining the approach in the interim final rule, including elaborations issued in further guidance, but providing additional clarification on its application, including methods to apply the approach to minimize administrative burden. Treasury notes that recipients may assess the extent to which staff are dedicated to responding to COVID-19 through a variety of means, including establishing presumptions or assessing public health and safety staff at the division or operating unit level. For example, a recipient could consider the amount of time spent by employees in its public health department’s epidemiology division in responding to COVID-19 and, if a majority of its employees are dedicated to responding to COVID-19, determine that the entire division is primarily dedicated to responding to COVID-19. Treasury also clarifies that recipients may use reasonable estimates to establish administrable presumptions; for example, a recipient could estimate, based on discussions with staff, the general share of time that employees in a specific role or type of position spend on COVID-19 related tasks and apply that share of time to all employees in that position. Recipients are generally required to be able to support uses of SLFRF funds as eligible, including, in this instance, maintenance of records to support an assessment that public health and safety staff are primarily dedicated to responding to COVID-19. As noted above, recipients may use reasonable estimates to implement this provision. Recipients should maintain records on how they developed these estimates and need not track staff hours. Treasury notes that records retained can include payroll records (e.g., the number and type of staff in various positions), attestations from supervisors or staff (e.g., self-attestation of share of time spent on COVID-19), or regular work product or correspondence (e.g., calendars, email correspondence, documents, and other electronic records). Treasury anticipates that these types of records are generally retained in many government settings; recipients should also consult the Award Terms and Conditions for SLFRF funds for

requirements on length of record retention. For example, a recipient could establish a reasonable presumption about the share of time that an employee, division, or operating unit is responding to COVID-19 and simply retain those employees' electronic records as a record to support their assessment.

(Emphasis added.) Additionally, the Final Rule (pg. 4385) provides the following:

The interim final rule recognized that COVID-19 response continues to require substantial staff resources and provides an administrative convenience to make it relatively simpler to identify the eligibility of the types of workers – public health and safety workers – generally most involved in COVID-19 response. At the same time, many public health and safety workers perform roles unrelated to COVID-19; coverage of all roles would be overbroad compared to the workers responding to COVID-19 in actuality. For this reason, the final rule maintains the interim final rule's approach to permitting SLFRF funds to be used for public health and safety staff primarily dedicated to responding to COVID-19.

(Emphasis added.) NDCS lacked adequate documentation to support that employees paid with SLFRF monies were “primarily dedicated” to responding to COVID-19. In fact, for the six-month period preceding the pandemic, from July 2019 to December 2019, NDCS charged \$10,885,798 for overtime, shift differential, and on-call hours. This shows that the average number of hours per month charged prior to the pandemic was very similar to that subsequently charged to SLFRF during the pandemic – which necessarily gives rise to questions regarding the extent to which employee duties were altered by the onset of COVID-19 and whether workers truly became “primarily dedicated” to responding to the outbreak.

In light of the above, NDCS appears to have expended \$12,392,009 in SLFRF monies in a manner inconsistent with not only the restrictive “premium pay” language in LB 1014 but also the Final Rule requirement for a periodic documented assessment showing that any individual employee(s) or unit/division receiving SLFRF payments has been “primarily dedicated” to responding to COVID-19. Therefore, we question that expenditure of \$12,392,009 in SLFRF monies by NDCS for overtime, shift differential, and on-call hours.

Per 2 CFR 1000.10 (January 1, 2022), “[T]he Department of the Treasury adopts the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, set forth at 2 CFR part 200.”

Per 2 CFR 200.403 (January 1, 2022), costs must be necessary, reasonable, and adequately documented.

As is relevant, 2 CFR 200.302(a) states, “Each state must expend and account for the Federal award in accordance with state laws and procedures for expending and accounting for the state's own funds.”

Additionally, good internal control requires procedures to ensure compliance with both State and Federal requirements when expending SLFRF monies.

Without such procedures, there is an increased risk for the improper expenditure of those Federal grant funds.

We recommend NDCS implement procedures to ensure compliance with both State and Federal requirements when expending SLFRF monies.

Department Response: In addition to the NDCS response included in the Management Letter, NDCS provided information to the Auditors in response to the FY2022 Statewide Single Audit Testing of CSLFRF on January 10, 2023. The information provided in that response also relates to this finding, as indicated below.

NDCS does not agree with the APA's finding regarding overtime, shift differential and on-call hours. NDCS believes these are allowable expenses under the federal regulations for CSLFRF and the Final Rule. COVID conditions resulted in significant vacancies in NDCS' facilities. Mandatory overtime was necessary for the majority of staff, especially those who had direct contact with incarcerated individuals. This included those who provided medical/mental health, food service and other services to inmates, as well as those who oversaw administrative and support roles. Daily staffing decisions/assessments were made to maintain safe and secure operations for inmates,

team members and the public at all times, since these facilities require staffing 24 hours a day/7 days a week/365 days a year.

Further, NDCS submitted additional documentation to the APA for the \$8 wage increase incurred during FY2023. As indicated by APA, the \$8 wage increase was an allowable expense and addressed the \$12 million amount referenced. Under State of Nebraska accounting policies and procedures, any federal funds received in a prior fiscal year carryover into the next fiscal year. We remain confident the documentation submitted by NDCS meets federal regulations. No corrective action plan is necessary.

APA Response: The “Coronavirus State & Local Fiscal Recovery Funds: Overview of the Final Rule,” issued by the U.S. Department of the Treasury (Department) in January 2022, states clearly, on page 26 thereof, the following:

SLFRF funding may be used for payroll and covered benefits for public safety, public health, health care, human services and similar employees of a recipient government, for the portion of the employee’s time spent responding to COVID-19.

(Emphasis added.) Likewise, on page 27 of that same document, the following reiteration is provided:

SLFRF funding may be used for payroll and covered benefits for the portion of the employees’ time spent on COVID-19 response, as calculated above, through the period of performance.

(Emphasis added.) As noted in audit finding 2022-007, moreover, page 4385 of the Final Rule contains the following:

At the same time, many public health and safety workers perform roles unrelated to COVID–19; coverage of all roles would be overbroad compared to the workers responding to COVID–19 in actuality. For this reason, the final rule maintains the interim final rule’s approach to permitting SLFRF funds to be used for public health and safety staff primarily dedicated to responding to COVID–19.

(Emphasis added.) Despite these explicit and unambiguous directives, NDCS attempts to defend its questioned expenditure of SLFRF funds by stating, “All public safety workers are presumed to have worked in a COVID capacity.” In addition to risking precisely the type of “overbroad” coverage warned against, such an outlook flies in the face of the Final Rule’s requirement that a proper allocation of SLFRF funds must be based upon a periodic documented assessment showing that any employee or unit/division receiving such grant monies has been “primarily dedicated” to responding to COVID-19. This is explained in detail on page 4384 of the Final Rule, which includes the following:

Recipients are generally required to be able to support uses of SLFRF funds as eligible, including, in this instance, maintenance of records to support an assessment that public health and safety staff are primarily dedicated to responding to COVID–19.

(Emphasis added.) An unsubstantiated presumption, such as that relied upon by NDCS, is insufficient to meet this plain requirement. Furthermore, we noted that overtime, shift differential, and on-call hours paid during the six-month period prior to the pandemic were almost indistinguishable from those paid during the pandemic; this indicates that the staffing issues faced by NDCS were not caused primarily by COVID-19.

The APA did not test documentation related to FY2023 that was received subsequent to our testing of the FY2022 transactions. State policies do allow for carryover of General Fund appropriations with certain restrictions; however, State policies do not allow for the charging of expenditures prior to the date of the obligation. FY2023 wages were not an allowable FY2022 expenditure per State or Federal policies.

2. Employee Timesheets

The Department used the Kronos system to track work time and duties for personnel. The Department's employees exempt from the Fair Labor Standards Act were not required to maintain timesheets or other supporting documentation for time worked; rather, they were required to record only leave used. Consequently, there was no support that all full-time employees rendered at least 40 hours of labor each week, as required by Neb. Rev. Stat. § 84-1001(1) (Reissue 2014). That statute states the following:

All state officers and heads of departments and their deputies, assistants, and employees, except permanent part-time employees, temporary employees, and members of any board or commission not required to render full-time service, shall render not less than forty hours of labor each week except any week in which a paid holiday may occur.

Similarly, the lack of timesheets or other records for tracking the hours worked by exempt personnel means that there is no documentation to support the proper accrual of employee sick and vacation leave.

The Department's payroll expenditures for the fiscal year ended June 30, 2022, totaled approximately \$172 million. This was for 2,653 employees, of whom approximately 369 were exempt.

A good internal control plan requires procedures to ensure that hours worked are adequately documented by timesheets or other supporting documentation, which should be kept on file to provide evidence of compliance with § 84-1001(1). Those same procedures should ensure also that adequate documentation is maintained to support that accrued employee sick and vacation leave was actually earned.

Without such procedures, there is an increased risk for not only payment of fraudulent or inaccurate employee work and leave hours but also the inability to support compliance with § 84-1001(1).

A similar finding has been noted since the fiscal year ending June 30, 2015, audit.

We recommend the Department implement procedures to ensure the adequate documentation of employee time worked, confirming thereby compliance with § 84-1001(1). Those same procedures should ensure also that adequate documentation is maintained to support that accrued employee sick and vacation leave was actually earned.

Department Response: Based on the Fair Labor Standards Act, exempt employees must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked, unless exceptions are met. The exception reporting of leave is an appropriate process for exempt employees. They are expected to work 40 hours per week, except when taking leave, and they often work more than 40 hours per week.

APA Response: The Department response was virtually the same last year. Our response last year, is still relevant and is as follows:

Reference to the FLSA is irrelevant to ensuring either compliance with § 84-1001(1) or proper leave accrual. Though not appropriate for determining the basis of pay for exempt employees, timesheets may be utilized for other purposes. According to an opinion letter issued by the U.S. Department of Labor, Wage and Hour Division, "[I]t is not a violation of the FLSA or its implementing regulations for your employer to track your working time, even if you are an exempt employee." 2004 DOLWH LEXIS 8 (Dep't of Labor Wage & Hour Div. May 13, 2004) While the Department might expect exempt employees to work 40 hours per week, there is currently no documented confirmation of such expectations being met. Requiring all employees, both exempt and non-exempt alike, to complete time sheets is the most reliable way to corroborate both compliance with § 84-1001(1) and the proper accumulation and recording of leave earned.

* * * * *

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 suitable for any other purposes. However, this communication is a matter of public record, and its distribution is not limited.

A handwritten signature in blue ink that reads "Kris Kucera". The signature is written in a cursive style with a large initial 'K'.

Kris Kucera, CPA, CFE
Assistant Deputy Auditor