



NEBRASKA AUDITOR OF PUBLIC ACCOUNTS

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March 22, 2024

Rick Schommer, Council President
City of Madison
PO Box 527
Madison, NE 68748

Dear Mr. Schommer:

As you know, the Nebraska Auditor of Public Accounts (APA) issued a letter on May 26, 2023, alleging certain work-related improprieties on the part of the City of Madison's (City) former Utilities Superintendent, James "Jim" Lewis. Specifically, that letter detailed not only Mr. Lewis' apparent misuse of City resources for considerable personal gain but also his questionable claims regarding hours supposedly worked – for which he received no small amount of compensation – as a municipal employee.

Due to the serious nature of those allegations, the APA forwarded a copy of the letter to the Nebraska Attorney General (Attorney General), the Madison County (County) Attorney, and the Nebraska Accountability and Disclosure Commission (NADC) for further review. As a result, the County Attorney filed criminal charges against Mr. Lewis on August 8, 2023, accusing him of Felony Theft by Unlawful Taking and Felony Tampering with a Witness. Additionally, the APA filed a formal complaint with the NADC regarding Mr. Lewis' suspected misconduct.

On December 13, 2023, the City Council voted not to reappoint Mr. Lewis as the municipal Utilities Superintendent, which position was declared to be vacant at that time. Less than a month later, however, the APA learned that Mr. Lewis had died unexpectedly on Wednesday, January 10, 2024. Consequently, the County Attorney dropped the criminal charges against him, as well as abandoned efforts to seek restitution for the attendant financial losses purportedly incurred by the City, and the NADC halted its own investigation.

Subsequent to the events described above, the APA learned of other allegations involving Mr. Lewis' apparent misappropriation of municipal property. Mr. Lewis was accused of routinely trading Armorcoat Gravel mix purchased by the City from Matteo Sand & Gravel for cases of meat from the local Tyson Foods plant. It is alleged that there was a freezer located at the City's sewer treatment plant usually full of meat. This illicit activity is reported to have occurred repeatedly since, at least, 2016. The County Sheriff's office initiated an investigation into these additional allegations against Mr. Lewis; however, similar to the other cases above, that inquiry was closed.

Regardless, it was brought to our attention recently that, among other concerns, the City Council has attempted to approve over \$7,000 in supposed wages to the estate of Mr. Lewis. Such compensation included the total amount of his regular pay, holiday hours earned, and a stipend salary for the period December 14, 2023, through January 10, 2024 – a span of time beginning the day after the City Council had voted already not to reappoint him as the municipal Utilities Superintendent and declared the position to be vacant, meaning that Mr. Lewis could have performed no further work for the City in that capacity.

Upon learning of the City's attempt to pay the estate of Mr. Lewis thousands of dollars for work that he did not – and, in fact, could not – perform, given the earlier date upon which his municipal employment had ended, the APA decided that further inquiry into the matter was warranted. Accordingly, the APA obtained from the Madison City Attorney, Michael T. Brogan, records and other documentation pertinent to that pending payment.

After careful analysis of the information that Mr. Brogan provided in response to the APA’s request, State Auditor Mike Foley sent the City Attorney an email message, dated March 4, 2024, containing the following:

“It is the view of my office that the anticipated payment is improper, and my office will be issuing a formal letter to the city to that effect.”

In order to understand why the APA believes the planned payment to Mr. Lewis’ estate to be improper, it is important to have a grasp of the events leading up to the City Council’s attempt to approve the disbursement. The APA has created the following timeline to facilitate that essential comprehension:

- Prior to the planned December 13, 2023, City Council meeting, the City posted an agenda – which, as shown by the excerpt below, included an item for the “Appointment of Officers” under the “NEW BUSINESS” section:

NEW BUSINESS:
Open public hearing to receive public comments concerning the application of El Sazon de Mima LLC for the application of a Class C-126041 Liquor License.
Discussion/Action on appointment of Deputy Treasurer/Bookkeeper - Lori Kellen.
Appointment of Officers: A. City Clerk – Kelli Dickes; B. City Treasurer – vacant; C. Utility Super/Water/Sewer/Public Works Commissioner – Jim Lewis. D. City Attorney – Mike Brogan; E. City/Economic Developer – vacant; F. Police Chief – Mike Hopen; G. Fire/Rescue Chief – Tim Reeves; H. City Physician – Twila Hoferer, APRN; I. Street Commissioner – John Zwingman; J. Street Superintendent – John Zwingman; K. City Engineer – Advanced Consulting Engineering Services; L. Madison County Joint Zoning/Planning Board – Roger Acklie; M. Board of Health – City Physician, Mayor Fite, President of the Council, and Police Chief.

- During the December 13, 2023, City Council meeting, **Mr. Lewis was not reappointed** to serve as the municipal Utilities Superintendent. According to the meeting minutes, as shown by the following excerpt, the Council exited executive session and then voted on appointing various municipal officers. **Mr. Lewis was not among those reappointments.** The failure to reappoint Mr. Lewis must be seen as an intentional act, tantamount to terminating his employment.

Motion by Councilmember Kellen, Second by Councilmember Zessin to enter into executive session at 6:13 p.m. to preserve the reputation of individuals and to discuss personnel issues. Roll call: Yeas: Kellen, Zessin, Schommer, Ainsworth . Nays: None. Absent: None. Motion carried.
Motion by Councilmember Kellen, Second by Councilmember Zessin to exit executive session at 7:30 p.m. ending the discussion on personnel issues. Roll call: Yeas: Kellen, Zessin, Schommer, Ainsworth. Nays: None. Absent: None. Motion carried.
Motion by Councilmember Kellen, Second by Councilmember Zessin to approve the following appointment of officers: City Attorney-Mike Brogan; Police Chief-Mike Hopen; Fire/Rescue Chief-Tim Reeves; City Physician-Twila Hoferer; Street Commissioner; John Zwingman; Street Superintendent-John Zwingman; City Engineer-Advanced Consulting Engineering Services; Madison County Joint Zoning/Planning Board-Roger Acklie; Board of Health-City Physician, Mayor Fite, President of the Council, and Police Chief. Yeas: Kellen, Zessin, Schommer, Ainsworth. Nays: None. Absent: None. Motion carried.

Due to the lack of details contained in the meeting minutes, which were signed by Mayor Robert Fite, the APA listened to a recording of proceedings. Near the end of the meeting, a concerned citizen asked for clarification regarding the officer appointments made. Mayor Fite is recorded responding as follows:

The ones that are vacant are A, B, C...

The “Appointment of Officers” section of the meeting agenda, as shown under the first bullet point above, makes the following officer designation: “C. Utility Super/Water/Sewer/Public Works Commissioner – Jim Lewis.” There can be no doubt, then, as to the meaning of Mayor Fite’s statement – namely, that the City Council had chosen not to appoint Mr. Lewis to serve again, thereby effectively terminating his municipal employment.

- On December 14, 2023, Mr. Brogan, in his capacity as the Madison City Attorney, wrote a letter to Mr. Lewis, which included the following:

I am informed it is the desire of the Council (Mayor Fite having abstained) not to approve your re-appointment due to your pending court proceedings that have been ongoing for the past several months. Their consensus is that you be placed on administration leave without pay until further action is taken by the Council.

A full copy of that letter, which was hand delivered to Mr. Lewis, has been included as **Attachment A** hereto.

- On December 19, 2023, the City approved the hiring of a new interim Utilities Superintendent.
- On December 20, 2023, a City employee emailed Mr. Brogan, the Madison City Attorney, asking if Mr. Lewis’ vacation should be paid out and whether he was still employed by the City. Rather than answering the question directly, Mr. Brogan responded that same day with the following:

It is my understanding he should be paid any unused vacation time for the year as a part of his prior compensation. This presumes he has already been paid for vacation time already taken for the year.

As a result, the City paid out the vacation leave previously earned by Mr. Lewis.

- On January 2, 2024, the City’s insurance carrier was notified that Mr. Lewis’ municipal employment had been terminated as of December 13, 2023.
- On January 10, 2024, Mr. Lewis passed away.
- On February 1, 2024, a family member of Mr. Lewis began sending email messages to certain City representatives, requesting specific correspondence and other documentation, as well as threatening possible legal action against the City and its staff. In a February 7, 2024, email message, this same person explained that Mr. Lewis’ family was under the impression that, per the Madison City Attorney’s letter on December 14, 2023, Mr. Lewis had been placed on unpaid leave.
- On February 14, 2024, the City Council discussed Mr. Lewis’ employment status and life insurance. During that meeting, Mr. Lewis’ family members asked the City to make a retroactive payment to his estate for the amount of his wages from December 13, 2023, until his death on January 10, 2024. The minutes for that meeting contain the following:

The Council moves that, effective December 13, 2023, while Jim Lewis is not reappointed to his former position as Utility Superintendent/Water/Sewer/Public Works Commissioner due to his court proceedings pending in Madison County District Court, he shall remain an at-will employee of the City of Madison but placed on administrative leave with pay. Motion to approve made by Councilmember Schommer, Seconded by Councilmember Ainsworth. Roll Call: Yeas: Schommer, Ainsworth, Nay: Kellen. Absent: Zessin.

- On February 16, 2024, Mr. Brogan, the Madison City Attorney, sent a letter to the City’s insurance carrier, explaining that Mr. Lewis had been placed on administrative leave without pay at the December 13, 2023, meeting. That letter stated the following:

The next day, December 14, 2023, Council President Rob Schommer had me draft a letter to Jim Lewis, notifying him that he was placed on administrative leave, and that he was not to come into work. Attached is a copy of the letter that Mr. Schommer delivered personally to Mr. Lewis that day. The clerical staff of the City took the letter to mean that Jim's employment was terminated, when in fact, that was not the intention of the City Council. You were apparently informed by a phone call that his employment was terminated, which affected his employment benefits. This was not a result that the City Council wanted.

Unfortunately, Jim Lewis passed away of natural causes on January 10, 2024, in his own home. Thus, he was never convicted of the pending criminal charges, and remains innocent, as he was not proven guilty. As such, Jim Lewis has a clean criminal record.

At no time between December 13, 2023, and January 10, 2024, was there any question regarding the fact that Mr. Lewis was neither performing work for the City nor receiving wages or other municipal compensation. During the December 13, 2023, City Council meeting, Mayor Fite acknowledged on the record that the Utilities Superintendent position had become vacant. Moreover, the City Council hired an interim Utilities Superintendent on December 19, 2023.

The minutes of the December 13, 2023, City Council meeting are clear that Mr. Lewis was not reappointed as the municipal Utilities Superintendent. Any other discussions or decisions by the City Council must have taken place – if they occurred at all – during executive session, with no subsequent action taken when that body reconvened in open session. The APA questioned Mr. Brogan, the Madison City Attorney, about this fact, and he responded with the following:

In answer to your question, yes, I was in attendance at the entire executive session on December 13, 2023. As I mentioned, the Council wanted to invite Jim Lewis into the executive session as well, but he could not be found that evening. That is why Rick Schommer (not Rob), Council President, instructed me to write the notice letter to Jim Lewis dated December 14, 2023, so Mr. Lewis could be informed of the status of his employment. I agree there was no public vote on placing Jim on administrative leave without pay, but my recollection is that all four Councilmembers in attendance were in favor of handling it that way on December 13. So Mr. Schommer's instructions the next day were consistent with what I heard the night before. Of course, the meeting minutes were deficient in not mentioning any vote or statement of unanimous consensus, which is why the Council made the public vote it did on February 14, 2024, to correct the record.

Attachment B hereto, which was also received from Mr. Brogan, contains a listing of the supposed work hours for which the City appears to be considering making payment to Mr. Lewis' estate. For the following reasons, however, the APA challenges the legitimacy of any such faux remuneration.

To start, the Open Meetings Act ("Act"), which is set out at Neb. Rev. Stat. §§ 84-1407 to 84-1414 (Reissue 2014, Cum. Supp. 2022), governs the actions of "public bodies" in Nebraska, which includes the City. In particular, Neb. Rev. Stat. § 84-1410 (Reissue 2014) of the Act permits a public body to meet in closed session for certain purposes. Subsection (2) of that statute provides the following, however:

The meeting shall be reconvened in open session before any formal action may be taken. For purposes of this section, formal action shall mean a collective decision or a collective commitment or promise to make a decision on any question, motion, proposal, resolution, order, or ordinance or formation of a position or policy but shall not include negotiating guidance given by members of the public body to legal counsel or other negotiators in closed sessions authorized under subdivision (1)(a) of this section.

(Emphasis added.) Moreover, it is worth noting that, aside from the decision not to appoint Mr. Lewis again as the municipal Utilities Superintendent, the meeting minutes are absolutely silent about anything else pertaining to his employment – or, more precisely, sudden lack thereof. This is crucial because Neb. Rev. Stat. § 84-1413(1) (Cum. Supp 2022) provides the following:

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

Subsection (2) of that same statute adds this requirement:

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.

Given the above statutory provisions, it appears safe to conclude that the City Council had no other intention – nor took any other formal action – than to terminate Mr. Lewis' municipal employment by not appointing him again.

More importantly, even if the City Council wished to pay Mr. Lewis's estate for work that he never performed, that political subdivision lacks the requisite authority to do so legally. The authority of a City, like all other political subdivisions, is strictly limited. As the Nebraska Supreme Court (Court) has stated:

The well-settled rule in this jurisdiction is that a municipal corporation possesses, and can exercise, the following powers and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; and third, those essential to the declared objects and purposes of the corporation-- not simply convenient, but indispensable.

Professional Firefighters of Omaha, Local 385 v. City of Omaha, 243 Neb. 166, 174, 498 N.W.2d 325, 331 (1993). The Court has also declared the following:

Statutes granting powers to municipalities are to be strictly construed, and where doubt exists, such doubt must be resolved against the grant.

L.J. Vontz Const. Co., Inc. v. City of Alliance, 243 Neb. 334, 341, 500 N.W.2d 173, 177 (1993). The APA is unaware of any express statutory provision authorizing retroactive payment for time not worked by a former municipal employee. Likewise, in light of the Court's observation regarding the strict construction of any statutory grant of authority to a municipality, it is highly doubtful that such retroactive payment could be seen as "necessarily or fairly implied in or incident to the powers expressly granted" to or "indispensable" to the "declared objects and purposes" of the City.

Likewise, the Local Government Miscellaneous Expenditure Act (LGMEA), which is set out at Neb. Rev. Stat. §§ 13-2201 to 13-2204 (Reissue 2022), specifies various expenditures, aside from those otherwise authorized by law, that constitute allowable uses of public funds by designated political subdivisions, such as the City. The LGMEA contains nothing that could reasonably be interpreted as authorizing the type of retroactive municipal payment at issue.

Finally, but certainly no less important, Article III, § 19, of the Nebraska Constitution prohibits gratuitous payments to public personnel, as follows:

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.) According to the Court, the prohibition in Article III, § 19, 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 City is subject to this constitutional injunction against gratuities.

The Court has explained the meaning of "extra compensation," for purposes of Article III, § 19, as follows:

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 also weighed in on 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).

In addition, the Attorney General has made the following point out about the timing of unconstitutional gratuities:

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.

Op. Att'y Gen. No. 95063 (Aug. 9, 1995). Therefore, a payment to a City worker whose municipal employment had been terminated prior to performance of any service for which such remittance is supposedly being granted – especially when no service was actually provided, as appears to have been the case with Mr. Lewis – would necessarily be constitutionally suspect under Article III, § 19.

Thus, for all of the reasons outlined in this letter, we believe the planned payment to Mr. Lewis' estate to be not only misguided and contrary to the facts surrounding the termination of his municipal employment but also potentially violative of both the City's limited statutory authority and the prohibition against gratuitous payments in Article III, § 19, of the Nebraska Constitution.

We recommend, therefore, that the City implement procedures to ensure that all disbursements of municipal fund are made for legitimate purposes and in strict accordance with Nebraska law. Furthermore, due to the serious nature of the issue addressed herein, the APA will be sending a copy of this letter to the Attorney General, the Madison County Attorney, and the Nebraska Accountability and Disclosure Commission.

City Response: In response to your draft letter emailed to Council President Rick Schommer, on March 8, 2024, all four Madison councilmembers agree that, after your letter is issued as a final public document, they will formally cancel and void the final employment compensation payment to James Lewis as was previously authorized by the Council's action on February 14, 2024. It should be noted that such action was made to correct a defect in the proceedings of the December 13, 2023, Council meeting. The Nebraska Supreme Court has held that violations of the Open Meetings Act can be cured by subsequent action of a public body in a meeting which complies with all of the statutory requirements of the Act. Pokorny v. City of Schuyler, 202 Neb. 334, 275 N.W.2nd 281 (1979). Nevertheless, after reviewing your legal authorities, the Madison City Council is persuaded that payment for "extra compensation" or "gratuities" are not authorized for periods where no service was actually provided by a municipal employee. Further, the City will endeavor to be more vigilant in ensuring that all future disbursements of municipal funds are made for legitimate purposes and in strict accordance with Nebraska law.

* * * * *

Our audit procedures are designed primarily on a test basis and, therefore, might not bring to light all weaknesses in policies or procedures that may exist. Our objective is, however, to use the knowledge gained during our work to make comments and suggestions that we hope will be 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 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.

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 these specified parties. However, this communication 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

Mason Culver – Auditor-In-Charge

Sincerely,



Craig Kubicek, CPA, CFE

Deputy Auditor

Auditor of Public Accounts

Room 2303, State Capitol

Lincoln, NE 68509

Phone (402) 471-3686

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CITY OF MADISON
Letter to Mr. James "Jim" Lewis

Attachment A

CITY OF MADISON
211 S. LINCOLN - P. O. BOX 527
MADISON, NEBRASKA 68748

December 14, 2023

Mr. James M. Lewis
1008 S. Lincoln Street
Madison, NE 68748

RE: *Appointments*

Dear Jim:

As you know, the annual Appointment of Officers was on the Agenda of last night's Madison City Council meeting. I am sorry to be the one to officially notify you that you were not re-appointed to your former position of Utility Superintendent/Water/Sewer/Public Works Commissioner. I am informed it is the desire of the Council (Mayor Fite having abstained) not to approve your re-appointment due to your pending court proceedings that have been ongoing for the past several months. Their consensus is that you be placed on administration leave without pay until further action is taken by the Council. You are not to go in to work or perform any work or supervisory functions for the City of Madison for the indeterminate future. Should you receive any calls for service, you should refer them to Doug McFadden or Matt Schnebel.

Please call me or Councilman Schommer if you have any questions or concerns. Thank you for your expected cooperation.

Yours very truly,

CITY OF MADISON


Michael T. Brogan
City Attorney

cc: Rob Fite, Mayor
Rick Schommer, Councilmember
Lori Kellen, Acting Office Manager

Jim Lewis’s Hours

December 14th – 15th 2023 Regular Pay of 16 hours

December 16th – 29th

- 18th – 22nd Regular Hours, 8-hour shifts, 40-hour week
- 24th – 4 hours of Holiday Pay (Plus Stipend Pay)
- 25th – 8 hours of Holiday Pay
- 26th – 29th Regular Hours, 8-hour shifts, 4-day work week equaling 32 hours.

Payroll December 30th – January 12th

- December 31st – 4 hours of Holiday Pay
- January 1st – 8 hours of Holiday Pay (Plus Stipend Pay)
- January 2nd – 5th Regular Hours, 8-hour shifts, 4-day work week equaling 32 hours.
- January 8th – 10th Regular Hours, 8-hour shifts, 3-day work week equaling 24 hours.

Regular Hours – 144 at \$44.52

Holiday Pay – 24 at \$44.52

Stipend Pay - \$257.13 x 2 Pay Periods