



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
www.auditors.nebraska.gov

October 1, 2018

Jason Hicks, Board Chair
Village of Palisade
122 North Main Street
Palisade, NE 69040-0288

Dear Mr. Hicks:

As you know, the Nebraska Auditor of Public Accounts (APA) has received concerns regarding holiday bonus payments being made to Village of Palisade (Village) employees. Responding thereto, the APA began limited preliminary planning work to determine if a full financial audit or attestation would be warranted. In doing so, the APA requested certain information from the Village. Based upon the outcome of this preliminary planning work, the APA has determined that it is unnecessary for this office to perform a separate financial audit or attestation of the Village at this time.

Nevertheless, during the course of the preliminary planning work, we noted certain internal control or compliance matters, or other operational matters within the Village, that are presented below. The following information is intended to improve internal controls or result in other operational efficiencies.

Comment and Recommendation

Payments Made Prior to Board Approval

In December 2016 and 2017, the Village paid holiday bonuses, totaling \$900, to its employees, as illustrated by the table below:

Payee	Bonus Year	Check Number	Check Date	Gross Amount	Check Amount (Net)
Clerk/Treasurer	2016	4199	12/20/2016	\$200.00	\$184.70
Part-Time Employee 1	2016	4198	12/20/2016	\$50.00	\$46.17
Part-Time Employee 2	2016	4200	12/20/2016	\$50.00	\$46.18
Part-Time Employee 3	2016	4201	12/20/2016	\$50.00	\$46.18
Sodtown Sundries (<i>Note 1</i>)	2017	4702	12/19/2017	\$550.00	\$550.00
Totals				\$900.00	\$873.23

Note 1: Gift Certificates were given to five employees.

All of these holiday bonus checks were issued before the underlying claims were approved by the Village Board (Board). In particular, the \$550 check to Sodtown Sundries cleared the bank on December 26, 2017; however, the Board did not discuss or approve the claim until the January 10, 2018, meeting. The following was noted in the "Miscellaneous Business" section of the minutes for that meeting:

There was discussion on holiday bonuses for Village employess [sic]. Motion was made by Monnahan and seconded by Hicks to give Clerk Miller and Superintendent Herrin each a \$200.00 gift certificate to Sodtown Sundries and to give \$50 gift certificates to Sodtown Sundries to Cindee Wagner, Patty Post and Kirk Gates. Yea: Monnahan, Ott and Hicks. Nay: None. Abstain: Malcolm. Motion Carried.

The APA also noted that the 2016 holiday bonuses were discussed and approved at the December 14, 2016, meeting; however, the amounts did not appear among the claims approved at that meeting. Other Village claims were also noted as being approved after the payment date.

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.

Impermissible Gratuities

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 provided the APA with several pages from its formal policies, including a section entitled “Periodic Pay Increase and Advancement.” A provision therein states, “Annual bonus and salary adjustments will be based on job performance and funds available.”

The Nebraska Supreme Court (Court) has offered the following observation regarding the State’s authority over the operations of its political subdivisions, such as the Village:

Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. . . . In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will

Lynch v. Metropolitan Utilities Dist., 192 Neb. 17, 22-23, 218 N.W.2d 546, 550 (1974) (quoting City of Millard v. City of Omaha, 185 Neb. 617, 177 N.W.2d 576, quoting Hunter v. City of Pittsburgh, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151). The Court has elaborated upon the subordinate nature of political subdivisions, as follows:

Political subdivisions ‘are purely entities of legislative creation. They do not exist independent of some action of the legislative department of government bringing them into being. All the powers which they can possess are derived from the creator. Unlike natural persons they can exercise no power except such as has been expressly delegated to them, or such as may be inferred from some express delegated power essential to give effect to that power.’

Nebraska League of Sav. and Loan Associations v. Johnson, 215 Neb. 19, 24, 337 N.W.2d 114, 117 (1983) (quoting Metropolitan Utilities Dist. v. City of Omaha, 171 Neb. 609, 614, 107 N.W.2d 397, 401 (1961)). More succinctly yet, the Court has stated the following:

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). Finally, the Court has commented upon the restrictive nature of statutory grants of authority to political subdivisions, as follows:

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).

With these judicial pronouncements in mind, the APA has searched unsuccessfully for any express, or even implied, grant of legislative authority for the Village to give its employees holiday cash bonuses.

The Local Government Miscellaneous Expenditure Act, which is set out at Neb. Rev. Stat §§ 13-2201 to 13-2204 (Reissue 2012, Neb. Laws 2018, LB 1036, § 1), specifies the various types of auxiliary expenditures allowed by political subdivisions, including villages. In particular, § 13-2203 provides, in relevant part, the following:

In addition to other expenditures authorized by law, each governing body may approve:

* * * *

(3) The expenditure of public funds for plaques, certificates of achievement, or items of value awarded to elected or appointed officials, employees, or volunteers, including persons serving on local government boards or commissions. Before making any such expenditure, the governing body shall, by official action after a public hearing, establish a uniform policy which sets a dollar limit on the value of any plaque, certificate of achievement, or item of value to be awarded. Such policy, following its initial adoption, shall not be amended or altered more than once in any twelve-month period.

(Emphasis added.) The above language permits the expenditure of public funds¹ for specifically designated items of value, not cash bonuses. More importantly, no such gifts may be given unless, after a public hearing and by official action, the City has first established a “uniform policy” that sets a dollar limit on the value of the item awarded.

When considering the language in § 13-2203(3), it is necessary to keep in mind the doctrine of statutory interpretation encapsulated by the following Latin term: “expressio unius est exclusio alterius.” The Court has translated this to mean, “[T]he expression of one thing is the exclusion of the others.” Vill. of Memphis v. Frahm, 287 Neb. 427, 433, 843 N.W.2d 608, 615 (2014). More specifically, the Court has explained the following:

The maxim, expressio unius est exclusio alterius, which is operative in the law as an aid in the determination of legislative intent with reference to statutory grants of power, means that where a statute enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned, unless the Legislature has plainly indicated a contrary purpose or intention.

Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 120, 54 N.W.2d 409, 418 (1952) (quoting School District of Omaha v. Adams, 151 Neb. 741, 752-753, 39 N.W.2d 550, 556 (1949)). Consequently, whenever a statute, such as § 13-2203(3), contains a listing of items, anything not expressly included in such list is understood to have been intentionally excluded from it.

¹ Per § 13-2202(4), the term “public funds” means “all money, including nontax money, used in the operation and functions of governing bodies” that is “under the direct control of governing bodies of local governments.”

The APA finds it difficult to imagine how the cash holiday bonuses given by the Village could be said to fall comfortably within the “plaques, certificates of achievement, or items of value awarded” language found in § 13-2203(3).

Furthermore, the Nebraska Accountability and Disclosure Commission issued “A Guideline to the Use of Public Funds by Cities and Villages” (Guideline) in 1993. Among other things, the Guideline addresses the issue of cash bonuses, as follows:

Question #2: May municipal funds be used to provide cash bonuses in recognition of excellence, provide cash incentives for not using sick leave, or provide cash incentives for exemplary safety records?

Response: These uses of public funds are permissible. However, they are all likely to be considered compensation by the Internal Revenue Service. Cities and villages have the authority to establish compensation policies for city employees. A municipality may wish to consider establishing policies in this area if it intends to use any of the foregoing incentives.

As the Guideline makes clear, the acceptable bonuses are incentives for specific performance, which constitute part of a formal employee compensation plan or policy – not gratuitous holiday gifts or the like.

Finally, but by no means any less important, is the prohibition against gratuities found in Article III, § 19, of the Nebraska Constitution. That provision says, in relevant 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.

The Court has explained the meaning of “extra compensation” in 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 Nebraska Attorney General has commented upon 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.

Op. Att’y Gen. No. 95063 (Aug. 9, 1993). More succinctly yet, the Attorney General has stated regarding Article III, § 19, “Nebraska law generally requires work be performed in order for payment to be received.” Op. Att’y Gen. No. 95071 (Sept. 13, 1995).

It is important to note also that the Court has ruled the prohibition against gratuities in Article III, § 19, to be 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 use of public funds to make the holiday bonus payments discussed herein appears not only to be unauthorized by State statute but also violative of Article III, § 19, of the Nebraska Constitution. This would not be true of any such bonuses made with private funds – for instance, if the Board members or others were to donate their own money to make the payments. When public funds are involved, however, the practice is, to say the least, suspect.

Good internal control requires procedures to ensure that any payments, including cash bonuses, to Village employees are made in strict accordance with governing statutory and constitutional provisions.

Without such procedures, there is an increased risk for the unlawful distribution of Village funds.

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. We also recommend the Village consult with the Village Attorney, County Attorney, or the Nebraska Attorney General regarding the permissibility of giving employees bonuses.

* * * * *

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 comment and recommendation contained herein. The Village declined to respond.

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.

Sincerely,



Mary Avery
Special Audits and Finance Manager
Phone 402-471-3686
mary.avery@nebraska.gov