



25325 FAIRMOUNT BLVD
BEACHWOOD, OHIO 44122

March 10, 2015

MAYOR
MERLE S. GORDEN

The Honorable David Yost
Auditor of the State of Ohio
88 East Broad Street
Columbus, Ohio 43215

RE: Response to 2013 Fiscal Audit of the City of Beachwood, Ohio

Dear Auditor Yost:

The City of Beachwood (hereafter "Beachwood") is in receipt of findings for recovery based on the 2013 audit performed by your office. Contained therein are three findings for recovery. Beachwood Mayor Merle S. Gorden, Beachwood Finance Director David Pfaff and the undersigned respectfully disagree and object to your office's findings for the reasons set forth below. Notwithstanding Beachwood's objection, in order to avoid the high cost of litigation for all parties, including the taxpayers of the State of Ohio, and to move forward in a direction most beneficial to the citizens of Beachwood, Mayor Gorden, on today's date, has made the payments to Beachwood that your findings reflect. Please find enclosed a copy of the check from the Mayor to Beachwood in the amount of Two Thousand Eight Hundred and Twenty Seven Dollars and No/Cents ((\$2,827.00) along with a receipt from Beachwood confirming the same.

The Mayor's willingness to resolve and close this matter should not be taken as a concurrence with your opinions. I have advised the Mayor that I would not seek to enforce your findings as I believe there is insufficient evidence in your audit to support any finding for recovery. I believe any cause of action brought to enforce your findings would fail to survive a preliminary dispositive motion. However, he has chosen to conclude this matter nonetheless.

As a point of law, your office is authorized to report findings for recovery for the reasons set forth in Section 117.28 of the Ohio Revised Code. That section provides in pertinent part:

Where an audit report sets forth that any public money has been illegally expended, or that any public money collected has not been accounted for, or that any public money due has not been collected, or that any public property has been converted or misappropriated ***.

Your findings for recovery do not specifically set forth a nexus between a violation of law, ordinance or policy and the statute as set forth above. Rather, the findings seem to draw conclusions based on opinion, and therefore are contrary to law.

LAW DEPARTMENT
BRIAN A. REALI, LAW DIRECTOR
PHONE (216) 595-5462 • FAX (216) 595-5466 • www.BEACHWOODOHIO.COM

Page Two
March 10, 2015

Your first finding for recovery is in the amount of Nine Hundred and Ninety Five Dollars and No/Cents (\$995.00) for compensation the Mayor received in 2013 for the performance of wedding ceremonies. The Mayor's compensation ordinance as most recently readopted in July of 2013 and codified in pertinent part at Section 131.06 of the Beachwood Codified Ordinances, authorizes the Mayor to be compensated for the performance of wedding ceremonies paid by couples to Beachwood. This process was approved by Beachwood City Council and was a system that was well known to your office, and at least indirectly approved by your office for many years.

It is true that the Mayor's secretary created and used an internal working document that contained the word "fee" as opposed to "gratuity" (note that document was amended in May of 2014 when its use was discovered). It is also true that the Mayor's secretary was surreptitiously recorded on the telephone using the word "fee" when responding to a fictitious wedding inquiry. However, as Beachwood previously brought to your attention, the final analysis should not be based merely on the words "fee" or "gratuity." A "gratuity" can take various forms, i.e. "mandatory gratuity," "set gratuity," and "voluntary gratuity." You previously indicated that Seventy Five percent (75%) of the monies paid to Beachwood for weddings performed by the Mayor were for the same amount. A true fee would have a mandatory compliance rate of One Hundred percent (100%).

Notwithstanding that our offices differ on the meaning of "gratuity," your auditors and investigators were aware of both the above referenced internal working document and the recorded telephone call prior to our post-audit meeting in July of 2013 (where no issues or findings were presented to the Beachwood administration and Beachwood City Council (your staff referred to our audit as "THE standard" relative the proper fiscal management of a municipality (Emphasis added)).

Monies paid to the Mayor for the performance of weddings were paid to the Mayor as taxable compensation, pursuant to your office's guidance, an Ohio Attorney General opinion and a properly enacted City ordinance. As such, Beachwood believes that monies paid to the Mayor for the performance of weddings are monies that have been legally expended and therefore fall outside of the purview of R.C. 117.28.

As noted above, the internal working document has had the word "fee" removed. Finally, based in part on concerns of your office, the Mayor ceased the performance of weddings in October of 2014. As opposed to a finding for recovery for the year 2013, we believe these remedial actions of Beachwood should be sufficient to address your concerns.

Your next two findings result from your belief that the Mayor should not have stayed in Columbus, Ohio following two trips he made relating to the public business of Beachwood and that because he did stay overnight, he should have taken two vacation days for the travel days

Page Three
March 10, 2015

back to Beachwood. You issued findings for recovery in the amount of Four Hundred and Eighty Two Dollars and No/Cents (\$482.00) and One Thousand Three Hundred and Fifty Dollars and No/Cents (\$1,350.00) respectively. As these findings are related, they will be addressed together.

At the time of the referenced Columbus trips, Beachwood had a valid and authorized travel policy which included a meal and lodging rule. Section 5.15 of the Beachwood Employee Policy Manual simply did not prohibit an overnight stay, following a meeting, regardless of when the meeting may have ended. Regarding meals, the same policy set forth that when an employee is traveling on City business the employee may be reimbursed up to the per diem rate. Therefore, the policy left appropriateness of overnight lodging to the discretion of the Mayor.

We certainly understand that there may be room for debate in determining what necessitates overnight lodging. But, your findings appear to substitute your opinion for that of the lawfully elected Mayor. Further, your findings seem to indicate that in your opinion, the meetings ended early enough that the Mayor should have driven home that day. However you do not suggest when it would have been appropriate for him to seek lodging following a meeting. For example, if the meetings would have ended after 4:00 P.M. would your office have found the expenditures appropriate? Subjectively, we understand a disagreement to this question, but legally, the finding is not based on any known violation of a statute or ordinance.

To complicate matters, your office reviewed the Mayor's calendar on his return travel days from the respective Columbus meetings to Beachwood and concluded that because the calendar had no entries, he did no work. Therefore, in your opinion, he should reimburse Beachwood for two vacation days. This conclusion may mesh with one's personal approach to how one should maintain a calendar, but failing to account for every hour of a business day on a calendar does not mean the Mayor was not performing any of his many duties as Mayor on those days. Or that a One Hundred and Forty Eight (148) mile drive back to Beachwood from Columbus the next morning necessarily meant expenditure of an entire vacation day.

By way of comparison, I draw your attention to the Ohio Office of Budget and Management Revised Travel Rule dated April 15, 2014. Specifically, "Lodging" as set forth at Section 126-1-02 (F) authorizes state employees to receive overnight lodging when travel is only forty five miles from the state agent's residence and headquarters. The Mayor of Beachwood is prohibited by your reasoning from acquiring overnight government authorized lodging following a meeting at the Ohio Department of Transportation in Columbus (approximately One Hundred and Forty Eight miles from his home). Yet, an employee of a state agency who lives in Columbus, could theoretically be authorized overnight government authorized lodging when conducting State business just off Interstate 70 in the City of Springfield, Ohio (approximately forty five miles from his/her home). By your findings, you have prohibited an act, which *you* and other state employees are legally permitted to engage in. It seems the standards you are imposing on Beachwood are far different than standards set for the agencies and offices representing the State of Ohio.

Page Four
March 10, 2015

Nonetheless, based partly on the concerns of your office, Mayor Gorden instructed Finance Director Pfaff and the undersigned to develop and implement a more defined travel policy. As such, on March 1, 2015, Beachwood implemented a policy that limits overnight lodging stays to outside of a seventy-five mile radius of the employee's residence and moves away from per diem reimbursements for meals, to receipt based and dollar-capped reimbursements for meals. Finally, at the Mayor's direction, City Council will be presented with legislation on March 16, 2015 to restructure the Mayor's vacation package. Moving forward, the Mayor will be completely excluded from Beachwood administration's vacation policy- no vacation accrual; no ability to convert unused vacation to compensation.

Again, we understand that you may personally disagree with Beachwood's travel policy as it existed in 2013. However, the findings contain no specific citation to any violation of statute or ordinance. Further, based on the changes implemented by Beachwood, we submit that Beachwood has sufficiently remedied this finding.

Beachwood does not believe that a sufficient nexus exists between your conclusions and any of the four statutorily authorized reasons for issuing a finding for recovery. We see no inference that the findings are based on public money being collected and not accounted for, public money that is due and not collected, or public property that has been converted or misappropriated. Therefore, we assume, that your basis for findings rest on public money being "illegally expended."

However, your findings do not meet even your office's definition of "illegal expenditure." I refer you to the Ohio Compliance Supplement Implementation Guide (Revised February of 2015) as promulgated by your office. In that document your office sets forth an illegal expenditure as being an expenditure for which there was no statutory authority or an expenditure that exceeds statutory authority.

The United States Court of Appeals for the Sixth Circuit addressed the issue of whether the Auditor of State could deem any payment an "illegal expenditure," without reference to any other authority but the Auditor's own, in *Mahoning Valley Sanitary District ex rel. Montgomery v. Gilbane Building Co.*, 86 Fed. Appx 856 (2004). The appeals court upheld the decision of the district court which found, "for expenditures to be illegal, it must violate an identifiable existing law." Your findings for recovery do not meet this standard as they do not identify any existing law that has been violated.

Beachwood submits that the findings subject to the 2013 audit cannot be held to be an illegal expenditure because duly enacted City ordinances and appropriate City policies existed covering the performance of weddings, travel, lodging and vacation. While your office has cited one internal wedding document and a surreptitiously recorded telephone conversation that used the word "fee" –which term your office concluded conflicted with the language of the ordinance,

Page Five
March 10, 2015

your findings point to no expenditure or conduct that contradicts, violates or exceeds any statute, policy or ordinance.

Your findings also contain no reference that any of the expenditures lacked a proper public purpose. As you are aware, what is or is not a proper public is a legislative function, left to limited review by the judiciary. *See Bazell v. City of Cincinnati*, 13 Ohio St. 2d 63 (1968). A city council has the authority to set compensation for a mayor subject only to approval to their constituents. Findings for recovery relative to Beachwood appear to be substituting the will of your office for that of the taxpayers of Beachwood.

Beachwood has and will continue to cooperate with your office on all occasions. We look forward to continuing to provide the citizens of Beachwood high quality services based on a conservative financial approach to good government.

Please do not hesitate to contact me with any questions or comments.

Sincerely,



Brian A. Reali
Law Director

BAR:kn

Enclosures

cc: Mayor Merle S. Gorden
Fredric S. Goodman, President of Beachwood City Council
Finance Director David A. Pfaff
Dan Stuetzer, Chief Auditor Northeast Region

MERLE S GORDEN
HARRIET F GORDEN

12 KENWOOD CT
BEACHWOOD, OH 44122-7601

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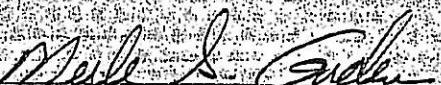
Date 3/10/15

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FOR CLEAR COPY, PRESS FIRMLY

DATE 3-10-15
DEPOSITS MAY NOT BE AVAILABLE FOR IMMEDIATE WITHDRAWAL

CURRENCY	DOLLARS	CENTS
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TOTAL
ITEMS

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