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May 29, 2008

The Honorable Stephen Hallan
Pine County Commissioner
21007 St. Croix Rd. SE
Pine City, Minnesota 55063

The Honorable Curt Rossow
Pine County Commissioner
P.O. Box 82
Willow River, Minnesota 55795

The Honorable Ed Montbriand
Pine County Commissioner
15102 Edgewater Rd. NE
Pine City, Minnesota 55063

The Honorable Doug Carlson
Pine County Commissioner
47540 Little Sand Creek Rd.
Sandstone, Minnesota 55072

The Honorable Roger Nelson
Pine County Commissioner
53329 Barns Spring Road
Hinckley, Minnesota 55037

Dear Pine County Board of Commissioners:

The Office of the State Auditor reviewed Pine County's personnel rules and policies that permit the "informal accrual" of paid time off ("PTO") for elected officials in Pine County, and the deposit of PTO payments into health care savings plan accounts ("HCSA") as a "severance" for the elected officials. We believe the existing policy does not comply with Minnesota law. As a result, we recommend that Pine County ("County') amend its Policies and Procedures to comply with Minnesota law, and take appropriate measures to resolve these issues.

County PTO Policies

Section 7.0 of the Pine County Policies & Procedures Handbook provides that, "[e]ffective January 1, 2007, Elected Officials shall informally accrue PTO based on the number of consecutive years served as an elected official."[1] The County's policy then sets the PTO accrual rates per month for elected officials, with a maximum accrual amount of 80 days/640 hours.[2] The County adopted this policy at its October 2, 2007, meeting.[3]

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[1] Pine County Policies & Procedures Handbook, § 7.0, retrieved from the County's website on February 20, 2008.
[2] *Id.* According to § 7.0(b), elected officials "informally accrue" PTO at the following rates:

Date of hire through Year 4	2.92 days per month
Start of Year 5 through Year 9	3.17 days per month
Start of Year 10 through Year 14	3.42 days per month
Start of Year 15 through Year 19	3.67 days per month

Under the County's policies, payments for the PTO hours accrued by elected officials are deposited into health care savings accounts as "severance" payments. However, if the elected official dies, the payments are made to the elected official's estate or designated beneficiary. Specifically, section 7.7 of the PTO policy provides:

> Effective January 1, 2007, the County will pay to all elected officials One Hundred percent (100%) of accrued Paid Time Off (PTO) into a Health Care Savings Account (HCSA) administered by the Minnesota State Retirement System. Payment of PTO shall be the median hourly dollar amount of elected officials. This median dollar amount deposited shall change each year based on the hourly salary of the following job classes: County Attorney, Sheriff, Treasurer, Auditor, and Commissioner. All PTO hours at time of resignation or retirement shall be deposited at 100% into a Health Care Savings Account as a severance to be used following separation of County service. All PTO hours payable upon death of an elected official will be made payable to the employees estate or designated beneficiary. (See Insurance Section)[4]

The insurance section of the County's policies provides, in relevant part:

> All PERA elected officials, full-time and permanent part-time non-union employees, will participate in the Health Care Savings Plan administered by the Minnesota State Retirement System as follows: a) Upon termination, any severance payment due will automatically be paid into the plan. b) Each pay period, two percent (2%) of gross wages will be deducted and deposited into the plan.
>
> In addition, all full-time, permanent part-time non-union employees, and elected officials that are eligible for Paid Time Off (PTO) as described in Article 7 of this guide will have 100% of any hours over the annual maximum deposited into the Health Care Savings Plan on the 1st pay period after the end of the calendar year.
>
> These funds shall be withheld pre-tax and invested at the direction of the individual employee, and may be used to pay eligible health care expenses as described by IRS Publication 502.[5]

The County informed us that two elected officials had funds transferred to health care savings plans as part of the County's February 8, 2008, payroll:

Start of Year 20 and beyond 3.92 days per month
(Maximum PTO accrual allowable amount shall not exceed 80 days/640 hours)

[3] According to County Board meeting minutes and the Board approval date in the Handbook, the policies and procedures were adopted as part of the consent agenda at the County Board of Commissioner's October 2, 2007, meeting. The PTO accrual rate was adopted at the County Board of Commissioner's November 20, 2007 meeting.

[4] *Id.* at § 7.7 (emphasis removed).

[5] *Id.* at § 8.4 (emphasis removed).

- $8,061.98, reflecting 30.96 PTO days, was transferred to a health care savings account for the County Auditor who retired; and
- $7,960.43, reflecting 30.57 PTO days, was transferred to a health care savings account for a County Commissioner who resigned.

According to the County, the PTO payments were calculated from January 1, 2007. We were informed that other elected officials had a lump sum of PTO hours set up on the February 22, 2008, County payroll, but no fund transfers had been made.[6]

Contributions to HCSAs Are Not Group Insurance Protection

As creatures of statute, counties have only those powers expressly granted by the legislature and those necessarily implied to enable exercise of the express powers.[7] Where the legislature has specifically authorized a particular local government activity and prescribed the conditions of its undertaking, action in excess of a prescribed limitation is implicitly precluded.[8]

The County directed our attention to Minn. Stat. § 471.61, subd. 2[sic], as authority for the County's policy. Minnesota Statute § 471.61, subd. 2a, allows counties to insure or protect retired officers and employees, regardless of whether the officer or employee was elected or appointed, "under a policy or policies, or contract or contracts of group insurance or benefits covering life, health, and accident, medical and surgical benefits, or hospitalization insurance or benefits, . . . or any one or more of such forms of insurance or protection."[9] Similarly, Minn. Stat. § 375.055, subd. 5, allows county commissioners to "participate in any group insurance program instituted by the county board for county officers and employees."[10]

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[6] Under Section 8.4 of the County's policy, any hours over the annual maximum are to be deposited in the elected official's HCSA at the beginning of each calendar year; additional transfers would be made when the elected officials left County employment.

[7] *See, e.g., Welsh v. City of Orono*, 355 N.W.2d 117 (Minn. 1984).

[8] *See, e.g., Country Joe, Inc. v. City of Eagan*, 560 N.W.2d 681, 684 (Minn. 1997); *Lilly v. City of Minneapolis,* 527 N.W.2d 107 (Minn. App. 1995) (city does not have the power to grant employee health care benefits to persons not defined by statute).

[9] *See* Minn. Stat. § 471.61, subd. 2a. The Minnesota Attorney General's Office has recognized that Minn. Stat. § 471.61, subd. 2a, authorizes a county to provide group health insurance benefits for its retired officers and employees and dependents, and to elect to pay all or part of the premiums for such coverage. *See, e.g.*, Op. Att'y Gen. 125a-28 (May 1, 2001).

[10] *See* Minn. Stat. § 375.055, subd. 5.

In our view, however, HCSA is not a group insurance plan and contributions to an individual's HCSA are not payments for group insurance programs authorized by Minn. Stat. §§ 471.61 or 375.055. Instead, health care savings plans are tax-free savings used to pay the participant's post-employment health care costs.[11]

Health care saving plans administered by the Minnesota State Retirement System ("MSRS") are authorized in Minn. Stat. § 352.98.[12] The plans allow participants to save money, tax-free, to use upon termination of employment to pay for eligible health care expenses.[13] The plans are funded by employers who elect to put a specific dollar amount into the participant's account, or set aside a percentage of the participant's salary into the account.[14] The plans may also be funded by employees through a mandated monthly contribution, or the payout of unused vacation or sick leave at the time of termination of employment.[15]

Elected County Officials Are Not Eligible for Vacation or Sick Leave

Many employers have replaced traditional types of paid leave, such as vacation, sick leave and funeral leave, with one kind of paid leave, known as paid time off ("PTO"), to be used for any reason that an employee needs to be away from work. The County's policy provides that elected officials will "informally accrue" PTO for deposit into HCSAs as a severance to be used following separation of County service.

Under Minnesota law, the compensation plan for an elected official of a county "may not include a provision for vacation or sick leave."[16] We believe that this prohibition applies equally to a provision for "PTO." Therefore, elected officials are not eligible to accrue PTO, either formally or "informally." Therefore, we believe an elected official's HCSA may not be funded by the payout of PTO.

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[11] *See* Minn. Stat. § 352.98, subd. 1.

[12] Contributions to the plan must be determined through a personnel policy or in a collective bargaining agreement. *See* Minn. Stat. § 352.98, subd. 3. For additional information about the HCSAs established by MSRS, see http://www.msrs.state.mn.us/hcsp/; for additional information about Health Savings Accounts and Other Tax-Favored Health Plans, see Internal Revenue Service ("IRS") Publication 969, available at: http://www.irs.gov/pub/irs-pdf/p969.pdf.

[13] *See* MSRS website at: http://www.msrs.state.mn.us/hcsp/feat.htmls; for information about Medical and Dental Expenses, see IRS Publication 502, available at: http://www.irs.gov/pub/irs-pdf/p502.pdf.

[14] *See* MSRS website at: http://www.msrs.state.mn.us/hcsp/feat.htmls. .

[15] *Id.*

[16] *See* Minn. Stat. § 43A.17, subd. 10. The subdivision provides: "The compensation plan for an elected official of a statutory or home rule charter city, county, or town may not include a provision for vacation or sick leave. The salary of an official covered by this subdivision may not be diminished because of the official's absence from official duties because of vacation or sickness."

We recommend that the County use a method other than PTO to fund HCSAs for elected officials. For example, the County could elect to put a portion of an elected official's salary into the account.[17] Alternatively, the County could elect to put a specific dollar amount into an elected official's account at specified intervals. However, because elected officials are not eligible to receive vacation or sick leave, we believe the HCSAs of elected officials may not be funded with the payout of unused PTO.

"Severance" Payments For Elected County Officials

The County's policy provides the payment of PTO to elected officials' health care savings accounts as a "severance" to be used following separation from County service.[18] If the elected official dies before the severance pay has been disbursed, the payment must be made to a named beneficiary or the deceased's estate.[19]

Under Minnesota law, counties may provide county employees with severance payments.[20] If the employee dies before all or a portion of the severance pay has been disbursed, the balance due must be paid to a named beneficiary or the deceased's estate.[21] However, the severance pay statute does not authorize the payment of severance to elected officials. As a result, when looking at accumulated sick leave severance payments made to a retired sheriff, the Minnesota Supreme Court held that no authority existed for severance pay in the form of accumulated sick leave to a county officer.[22]

It is unclear whether the health care saving plan statute provides separate authority for counties to make severance payments to an elected official's HCSA.[23] However, even if the statute provides such authority, we question whether the County has the authority to make a severance payment to a designated beneficiary or the elected official's estate following the death of an elected official. Payments to a designated beneficiary or the estate appear to be unauthorized severance payments for elected officials.

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[17] The County currently uses this method of funding, depositing 2% of gross wages into the HCSAs. *See* Pine County Policies & Procedures Handbook, § 8.4.
[18] *See* Pine County Policies & Procedures Handbook, § 7.7.
[19] *Id.*
[20] *See* Minn. Stat. § 465.72, subd. 1. *See also* Minn. Stat. § 465.722 (severance pay for highly compensated employees).
[21] *See* Minn. Stat. § 465.72, subd. 1.
[22] *See Spaulding v. Bd. of County Commissioners, Kandiyohi Co.*, 238 N.W.2d 602, 306 Minn. 512 (1976). The law allowing severance payments to county employees was amended in 1988 to include the following language: "Severance pay does not include compensation for accumulated sick leave or other payments in the form of periodic contributions by an employer toward premiums for group insurance policies for a former employee." The amendment did not change the distinction between employees and officers relied upon in *Spaulding*.
[23] *See* Minn. Stat. § 352.98.

We recommend that the County consider putting a specific dollar amount into an elected official's account at specified intervals that are not related to the elected official's termination of County service. Alternatively, the County could elect to put a portion of an elected official's salary into the account. If the County decides to proceed with HCSA payments as severance payments, we recommend that the County seek further guidance from the Minnesota Attorney General's Office.

Recommendation

We believe that the County's PTO policy for elected officials, as currently drafted, does not comply with Minnesota law. We recommend that the County amend its Policies and Procedures to be in compliance with Minnesota law, and take appropriate measures to resolve these issues.

If you have any questions regarding this letter, please feel free to contact me directly at 651-297-3673.

Sincerely,

/s/Celeste Grant

Celeste Grant
Deputy State Auditor/General Counsel

cc. The Honorable John K. Carlson, County Attorney
The Honorable Cathy C. Johnson, County Auditor