



REBECCA OTTO  
STATE AUDITOR

# STATE OF MINNESOTA

## OFFICE OF THE STATE AUDITOR

SUITE 500  
525 PARK STREET  
SAINT PAUL, MN 55103-2139

(651) 296-2551 (Voice)  
(651) 296-4755 (Fax)  
[state.auditor@state.mn.us](mailto:state.auditor@state.mn.us) (E-mail)  
1-800-627-3529 (Relay Service)

May 31, 2011

Ms. Samantha Orduno  
City of Dayton City Administrator  
12260 S. Diamond Lake Road  
Dayton, Minnesota 55327-9655

Dear Ms. Orduno:

Thank you for discussing with the Office of the State Auditor various matters involving the City of Dayton. Among other things, the City's Public Purpose Expenditure Policy, the City's Cell Phone Use Policy, and the City's payment of dues for the Police Chief's membership in the Lions Club were discussed. This letter will provide the City with additional guidance on these issues.

### **City's Public Purpose Expenditure Policy**

The City adopted a Public Purpose Expenditure Policy in December 2007. Among other provisions, the Policy states that the City will send flowers for certain personal events in an employee's life.<sup>1</sup> You clarified that the City has not had any flower expenditures under the Policy during 2011.

The expenditure of public funds requires both a public purpose and legal authority.<sup>2</sup> In most governmental entities, funds for flowers, cards, or other items recognizing events in a public employee's life are collected from fellow employees or public officials. For example, you informed us that the City's employees have a separate employee club funded by monies paid or raised by the employees.<sup>3</sup> These sorts of employee clubs do

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<sup>1</sup> For example, the Policy states: "The City will also send flowers if one [*sic*] the following occurs:

- Death of the employee (if still working for the City);
- Death of the employee if they left employment due to a health condition and they were employed by the City at least three years;
- Serious accident or illness to employee while still employed;
- Surgery (once per year, otherwise a card if more than once);
- Birth of a child while employed by the City;
- Death of a family member while employed including spouse, parent/in-laws, child, grandparent or grandchild."

<sup>2</sup> Additional information on this topic is found in our Statement of Position on Employee Recognition Programs and Events, available on our website, [www.auditor.state.mn.us](http://www.auditor.state.mn.us).

<sup>3</sup> The Policy states that the City "supports" events planned and paid for by employees. You explained to us that the support does not include financial support.

not handle public funds. Therefore, they are able to serve as the funding source for flowers or gifts provided to public employees to recognize significant events in an employee's life.

The City's Public Purpose Expenditure Policy also provides that, in addition to an Employee Recognition Luncheon/Dinner, the City may sponsor an annual employee picnic or holiday party. You informed us that the City has provided an annual appreciation dinner for City employees and volunteers. While cities have specific statutory authority for a wellness and employee recognition program, we know of no authority for a city to hold picnics or holiday parties for employees.<sup>4</sup>

The City's Public Purpose Expenditure Policy also appears to authorize meals and refreshments at City and employee meetings "that have a purpose of discussing City issues." You informed us, however, that the City's practice is to provide meals only for the City Council's goal-setting workshop that begins at 6:00 p.m., because City officials attend the workshop directly after work. The City may only pay for necessary expenses – more than simply discussing City issues is required.<sup>5</sup>

We recommend the City consult with its attorney and/or seek an Attorney General's opinion prior to expending public funds for flowers, holiday parties, or picnics for employees.<sup>6</sup> The City should also consult with its attorney if the City decides to expand its current limited practice regarding meals for City officials or employees.

### **City's Cell Phone Use Policy**

The City adopted a Cell Phone Use Policy in July 2008. Among other provisions, the Policy limits personal calls made during work hours on City-owned cell phones.<sup>7</sup> If the number of minutes of the cell phone plan is exceeded, the Policy requires the employee to reimburse the City, within five days, for all personal calls made in that billing cycle.<sup>8</sup>

The Policy also provides that the City Council, City Administrator, Assistant to the City Administrator, and Department Heads, who are not assigned a City-owned cell phone,

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<sup>4</sup> See Minn. Stat. § 15.46 (wellness and employee recognition programs); Op. Atty. Gen. 59a-22 (November 23, 1966) (city funds could not be used for Christmas party for city employees).

<sup>5</sup> Additional guidance on determining whether meals for public officials and employees are necessary is found in Minnesota Attorney General opinions. See, e.g., Op. Atty. Gen. 63a-2 (May 6, 1965) (meetings discussing city business held during the usual meal time hours); Op. Atty. Gen. 285a (August 7, 1969) (library board's luncheon expenses).

<sup>6</sup> See Minn. Stat. § 8.07 (2010) (Attorney General opinions).

<sup>7</sup> The Policy does not discuss personal calls made on City-owned cell phones during non-work hours.

<sup>8</sup> You informed us that City-owned cell phones have been issued to the Police Chief, four police officers, and the Public Works Director.

and use their personal cell phone for City business, will be reimbursed 50% of the cost of their individual plans, including Blackberry service, up to \$50.<sup>9</sup>

The Minnesota Attorney General's Office has taken the position that political subdivisions are not authorized to provide cell phones to their employees for personal use.<sup>10</sup> Similarly, we know of no authority for the City to reimburse city employees or officials for 50% of their personal cell phone bills, up to \$50, simply because a personal cell phone was used for an unknown number of calls related to City business. We believe the City only has the authority to reimburse city employees or officials for actual verifiable costs attributable to the City business conducted on the personal cell phones.<sup>11</sup>

Allowing personal use of city-owned cell phones also has tax consequences. If an employer provides a cell phone to an employee, the employee receives a fringe benefit.<sup>12</sup> As long as the phone is used for business purposes, the fair market value of that fringe benefit is excluded from the employee's gross income.<sup>13</sup> However, the Internal Revenue Service (IRS) considers any personal use of the equipment to be income to the employee.<sup>14</sup>

The Small Business Jobs Act of 2010 removed cell phones and similar telecommunications equipment from the definition of "listed property" having special substantiation requirements.<sup>15</sup> However, unless the IRS provides further guidance, it appears that employers who provide a cell phone and/or service plan to an employee, by either paying the benefits directly or reimbursing the employee, must still include the fair market value of the employee's personal use of the communications equipment in the employee's gross income.

Therefore, the City should develop a consistent approach to determining an employee's personal use of an employer-provided cell phone to be included in the employee's gross

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<sup>9</sup> You informed us that the City Administrator, Assistant to the City Administrator, the Mayor, and two City Council Members have submitted reimbursement requests; four City public works employees using their own cell phones are not reimbursed for City business-related calls.

<sup>10</sup> See Letter dated November 4, 1998, from Assistant Attorney General Shelley Roe to attorneys for Osseo School District.

<sup>11</sup> The State of Minnesota, for example, only reimburses employees for costs separately identified for each state call in excess of the standard monthly service fee. The State discourages employees from seeking reimbursement because the employee's phone rate may be less economical than the State's contracted rate.

<sup>12</sup> See, e.g., Internal Revenue Service Notice 2009-46 (June 8, 2009) and Comments Requested on Cell Phone Proposals (June 9, 2009); Letter dated November 4, 1998, from Assistant Attorney General Shelley Roe to attorneys for Osseo School District.

<sup>13</sup> See, e.g., Internal Revenue Service Notice 2009-46 (June 8, 2009).

<sup>14</sup> *Id.*

<sup>15</sup> See Public Law 111-240 (September 27, 2010), § 2043(a), *amending* 26 U.S.C. § 280F(d)(4)(A). Further information on the requirements for "listed property" is available on the IRS website. See, e.g., Taxable Fringe Benefit Guide for Federal, State, and Local Governments (January 2011) at pages 62-63, available at: [http://www.irs.gov/pub/irs-tege/fringe\\_benefit\\_fslg.pdf](http://www.irs.gov/pub/irs-tege/fringe_benefit_fslg.pdf).

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income, or collect from the employee on a regular basis for any personal use.<sup>16</sup> The City should also determine how much of the reimbursement for one-half the cost of individual plans, up to \$50, should have been included as gross income.

We recommend that the City review and revise its Cell Phone Use Policy. For additional guidance, I have enclosed a copy of the State of Minnesota's Cellular Telephone Use Addendum to the Statewide Policy: Appropriate Use of Electronic Communication and Technology (revised July 21, 2009).<sup>17</sup> The City may also want to review the City of St. Paul's Cell Phone Policy (revised February 25, 2011) and Cell Phone Procurement Policy (revised January 31, 2011), available on the City's website.<sup>18</sup>

### **Lions Club Membership**

You informed us that the City pays for the Police Chief's membership in the Lions Club.<sup>19</sup> As discussed in our Statement of Position on Public Expenditures: Donations and Dues, this Office knows of no authority for this expenditure.<sup>20</sup>

### **Conclusion**

We hope that the City finds this letter to be helpful. If you have any questions, please feel free to contact me at 651-297-5853 or [Nancy.Bode@osa.state.mn.us](mailto:Nancy.Bode@osa.state.mn.us), or Terrilyn Diamond at 651-297-7108 or [Terrilyn.Diamond@osa.state.mn.us](mailto:Terrilyn.Diamond@osa.state.mn.us). We do not intend to take any further action on these matters at this time.

Sincerely,

*/s/ Nancy J. Bode*

Nancy J. Bode  
Assistant Legal Counsel

Enclosure

cc. The Honorable Doug Anderson, Mayor  
Mr. Steven McDonald, AEM Financial Solutions, LLC, City's Financial Services  
Kern, DeWenter, Viere, Ltd., City Auditor

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<sup>16</sup> See also IRS Publication 15 (Circular E) Employer's Tax Guide, § 5 (accountable and nonaccountable plans).

<sup>17</sup> The Addendum is also available on the Minnesota Department of Administration's website at: <http://www.admin.state.mn.us/fmr/documents/Policies%20&%20Procedures/Statewide%20&%20HR%20Policies/Cell%20phone%20Use%20Addendum%20-%20FINAL.PDF>.

<sup>18</sup> Links to the St. Paul policies are available at: <http://www.stpaul.gov/index.aspx?NID=1087>.

<sup>19</sup> You also stated that City Council members pay for their own Lions Club memberships.

<sup>20</sup> The Statement of Position is available on our website.