

MEMO

May 12, 2014

To: Oak Bluffs Board of Selectmen
From: Atty. John M. (Jack) Collins, Special Labor Counsel
Re: Council on Aging Handling of Non-Town Appropriated Funds

This Memo will update you on progress made during the investigation of possible mishandling of funds based on concerns initially raised by the Town Accountant that money was being received and expended by the Director of the Oak Bluffs Council on Aging in ways that appeared to violate applicable Massachusetts General Laws. Regrettably, the concerns have proven to be justified.

A report from the independent forensic accountant, John J. Sullivan, CFE with the firm of MELANSON HEATH & COMPANY, PC, confirms the suspicions that the Town Accountant had concerning possible inappropriate handling and reporting of funds and provides a basis for the Board to consider disciplinary and other action. That report concludes that numerous laws appear to have been violated, that even the most basic accounting and reporting was lacking, that the Director used his position to direct or divert monies to private entities, that he directed at least one other COA employee to participate in these activities on town time, that town resources were used to support non-municipal agencies or groups, that public bidding laws were not followed, that even the most rudimentary not-for-profit filing and reporting laws were ignored, and that funds belonging to the Town were diverted and expended at the direction of the COA Director in violation of applicable Massachusetts General Laws.

While the investigation by the independent accountant was stymied by a lack of records and the inability or unwillingness of the Director and others to identify the sources and recipients of most of the monies involved, the independent accountant and I agree that it does not appear that continuing the accounting aspect of the investigation will prove fruitful at this point.

The purpose of my Memo is to outline alternative actions the Board may wish to consider.

1. Discipline of COA Director

Clearly, there is ample evidence that funds have been mishandled for years by the Director, both personally and at his direction by others. In some cases this has involved, at a minimum, lack of record keeping. In others, it appears to have taken the form of diversion of town funds or monies that should have been town funds. Public bidding laws, not-for-profit filing and reporting laws, and possibly the State's Conflict of

Interest Law all may have been violated. A substantial number of customary records, including checks and money orders from the former savings account, as well as invoices supporting disbursements, are missing. Checks were often made out to “cash” or to individuals administering the account. Even where the checks were found, there is often no indication of the person for who they were issued. The source of funds, the identification of donors or others making payments for one of several “benefits” controlled by the Director or others at his behest, and the identity of alleged beneficiaries, by and large cannot be confirmed.

2. Layoff of Director and re-organization of the COA

- a. Since the COA has functioned for several months without a Director, the Board might consider, possibly in consultation with the COA Board, whether some form of reorganization is appropriate. This might include restructuring OB COA positions or possibly involving COA organizations from other island towns on an interim or long-term basis. Sharing a Director or other staff members, for example, might be an option. A layoff does not require a disciplinary hearing or appeal.
- b. The Outreach Coordinator, as you may know, has requested a reduction in hours of work since so much of her time had been devoted to working with the Quilting Fund operation. The same might be true of the Director’s position.
- c. As you know, for the better part of a year the Town Administrator and I have been attempting to resolve a series of issues involving the COA Director, primarily involving bullying or similar harassment complaints from a COA employee against the Director. An effort was made to have the Town Administrator work with the COA Director. While the Director had been placed on what might best be described as a *performance improvement plan*, for any number of reasons this has proven less than successful.

3. Report to Other State Agencies

- a. **OB Police, State Police and/or DA’s Office** While the preliminary investigation by the Oak Bluffs Police Department was unable to gather sufficient evidence to initiate a criminal prosecution, the additional data gathered by the forensic accountant could well supply enough information to warrant a reconsideration of that conclusion. Similarly, the accountant’s report might be shared with the State Police and/or District Attorney’s office, either of which might initiate criminal prosecution. The fact that checks actually made out to the Oak Bluffs Council on Aging were given to a private party and

deposited into a private account may be even more problematic.

These agencies will have to review the accountant's investigation report to determine whether the elements of each of these crimes may have been established:

- i. M.G.L.A. 266 § 30 Larceny or Embezzlement; and/or
- ii. M.G.L.A. 266 § 51 - Fraud or Embezzlement by a town officer

- b. **Inspector General's Office** The State's Public Bidding Law (MGL c. 30B) contains numerous provisions to assure that the public has an opportunity to submit a bid and that a fair rent is received, but no such process was followed. The Director acknowledged that he set and charged rent or accepted money from at least three private entities for use of the COA facilities each week for many years. Leasing of town property requires action by the Town Meeting and must be done by the Board of Selectmen.

Note: All such monies are the property of the town and one or more of the aforementioned law enforcement agencies might conclude that diverting them to a private bank account where the Director controlled their distribution was a violation of the embezzlement statute.

- c. **Dukes County Retirement Board and/or PERAC** M.G.L. c. 32 § 15 "Dereliction of Duty by Members," provides a series of penalties for government employees that engage in misappropriation, including forfeiture of part or all of one's retirement, and repayment to the local municipality of the amount diverted as well as the cost of an investigation.

- d. **State Ethics Commission** (M.G.L. c. 268A – Conflict of Interest Law)

- i. Whenever public employees solicit anything of substantial value (over \$50) for a non-governmental purpose, the solicitation must be scrutinized for compliance with M.G.L. c. 268A §23(b)(2). In particular, whether municipal employees are soliciting from those with whom they have official dealings, and whether the solicitation is using department resources for non-governmental purposes will be examined.
- ii. Municipal employees may not use department letterhead, computers or other equipment for private

correspondence including fundraising for private organizations.

- iii. Municipal employees may not under any circumstances seek, solicit or accept any gift, gratuity, or fee (including not only money but also any tangible or intangible personal property, including such things as food, beverage, promise, service or entertainment) for the benefit of a private entity, where there is any direct or indirect connection between the solicitation or acceptance and their municipal employment.
- iv. The Ethics Commission has issued a formal advisory opinion, EC-COI-12-1, that explains how the conflict of interest law applies to municipal employees who solicit donations or engage in fundraising on behalf of the municipality where the persons and entities approached for a donation may have business dealings with the municipality or its agencies or employees.
- v. Section 19 generally prohibits a municipal employee from officially participating in matters in which the employee or certain others has a financial interest.
- vi. Section 23(b)(3) prohibits a public employee from acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that anyone can improperly influence or unduly enjoy the public employee's favor in the performance of his or her official duties.

4. Attorney General's Office/Secretary of State/IRS Conducting a raffle requires compliance with various laws, including MGL c. 271, and involves a permit from the Town and strict accounting. Not-for-profit organizations must file annual reports with the Secretary of State and, in cases of charitable organizations, be registered with and report to the Charities Division of the Attorney General's office. IRS filing and reporting is also required. Donations made without these procedures in place are not tax deductible. The Director was involved in forming the Oak Bluffs Road Race, Inc. but the corporation was recently dissolved for failure to submit the required reports. No filing or reporting has ever been done by the Quilting Fund.

Recommendations

As I have cautioned in the past, until the Board has had an opportunity to review the independent accountant's report and conduct its own hearing, I would recommend that statements to the press be minimized, with all inquiries being referred to the Chair of the Board of Selectmen and/or Special Labor Town Counsel. The Director's reputation should not be harmed by unfounded speculation.

The following is recommended:

1. Add an agenda item to an upcoming Selectmen's meeting entitled something along the lines of "Report on Investigation of Council on Aging Director." (The Board is NOT required to conduct this in Executive Session, but might be able to do so if they were so inclined. In that case, 48 hour's notice to the Director - with certain wording - would be required.)
2. The meeting is not a "hearing" and the Board may but need not allow discussion by the Director or the public.
3. The Board may discuss this situation with the Council on Aging Board, but they are not required to do so (obviously only at a posted meeting.)
4. If the Board were so inclined, following discussion at the upcoming Selectmen's meeting, any of the above-mentioned actions might be taken, including a motion to schedule a disciplinary hearing.

Note: Were the Director to resign or retire before such hearing, the Board would not be able to impose any discipline. An alternative to the time-consuming and expensive process of imposing discipline, many municipalities have opted to negotiate a severance agreement with a department head or other employee where no criminal charges are yet pending. Any such agreement would require union involvement.

If the disciplinary route were chosen, I could be directed to prepare a list of charges and to present the case to the Board at such hearing.

- a. As a member of the bargaining unit (union), the Director is entitled to notice and a hearing before the Board to determine if there is just cause for discipline.
 - i. The notice would include a list of charges.
 - ii. The Director would have the opportunity to appear, cross-examine and present witnesses, and generally explain his side of the story.
 - iii. Discipline, if warranted, would be based on the severity of the offense and the Director's employment record, and could include anything up to and including termination.

- b. An appeal of any discipline would be to an arbitrator under the terms of the applicable collective bargaining agreement.
 - i. A new ("de novo") hearing would be required in front of the arbitrator. Typically this process takes 6-9 months.
 - ii. The arbitrator could uphold, modify or reverse the action of the Board.
 - iii. While a court appeal of an arbitrator's action is possible, in all but the most unusual situations courts will not overturn an arbitrator's decision. A decision could take years.

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