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STATE AUDITOR

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October 23, 2012

The Honorable Theo Beckmann  
Mayor, City of Freeborn  
P.O. Box 151  
Freeborn, Minnesota 56032-0151

Fire Chief Steve Seipp  
Freeborn Fire Department  
P.O. Box 108  
Freeborn, Minnesota 56032-0108

Dear Mayor Beckmann and Fire Chief Seipp:

The Office of the State Auditor (“OSA”) reviewed the City of Freeborn’s recent transfer of \$2,000 to the Freeborn Fire Department & Ambulance Relief Association and the City’s reimbursement of \$90 to the City’s Fire Chief for the filing of the Relief Association’s Articles of Incorporation with the Minnesota Secretary of State. Because the Freeborn Fire Department & Ambulance Relief Association is not a “relief association” as that term is commonly understood or as defined by Minnesota’s volunteer firefighter pension laws, the OSA knows of no authority for these City expenditures.

## **Background**

In March of 2012, the OSA wrote a letter to the City, the Town of Freeborn, and the Fire Chief regarding the Freeborn Fire Department.<sup>1</sup> In the letter, the OSA recommended that, among other things, the City take control of separate financial accounts maintained by the Fire Department. The various Fire Department financial accounts were turned over to the City.<sup>2</sup>

The OSA’s March letter also noted that the Fire Department did not have a related fire relief association. The letter provided information on where to obtain guidance if the City and the firefighters wanted to create a relief association or wanted the firefighters to become members of the statewide volunteer firefighters’ plan administered by the Minnesota Public Employees Retirement Association (“PERA”) for pension purposes.

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<sup>1</sup> See Letter to City, Town, and Fire Chief from OSA (March 21, 2012).

<sup>2</sup> See Email to OSA from Perry Berg (May 18, 2012). See also City/Freeborn Township Joint Meeting Minutes (April 10, 2012).

At a joint City and Freeborn Township meeting on April 10, 2012, the Fire Department notified the City Council that it was meeting with PERA on April 19, 2012.<sup>3</sup> The Fire Department was authorized at the meeting to start a relief association, as long as it didn't commit the city or the township financially.<sup>4</sup> On April 17, 2012, the OSA provided the City Attorney with additional guidance regarding the use of City funds for costs associated with the formation of a relief association.<sup>5</sup> More specifically, the OSA agreed that City funds formerly contained in the Freeborn Fire Fund could probably be used for administrative expenses related to the formation of a relief association.<sup>6</sup>

In June, the City agreed to obtain a cost analysis for prospective retirement coverage in the statewide volunteer firefighter plan.<sup>7</sup> In addition, the City agreed to reimburse the City's Fire Chief for costs associated with establishing a fire relief association, and to transfer \$2,000 from the Freeborn Fire Fund into a fire relief association account, once it was established.<sup>8</sup>

On June 18, 2012, the Minnesota Secretary of State certified that the Freeborn Fire Department & Ambulance Relief Association filed Articles of Incorporation as a nonprofit organization.<sup>9</sup> The City reimbursed the Fire Chief for the \$90.00 Secretary of State filing fees and transferred \$2,000 from the Freeborn Fire Fund to the Freeborn Fire Department & Ambulance Relief Association.<sup>10</sup>

### **The Freeborn Fire Department & Ambulance Relief Association Nonprofit**

Under Minnesota law, a municipal fire department, with approval by the applicable municipality or municipalities, may establish a new volunteer firefighters' relief association.<sup>11</sup> A "relief association" is defined in the firefighter pension statutes as an association that is: 1) organized and incorporated under chapter 317A [Minnesota's nonprofit corporation statute] and any laws of the state; 2) **governed by Minnesota Statutes Chapters 69 and 424A** [Minnesota's firefighter pension statutes]; and 3) directly associated with a fire department established by municipal ordinance.<sup>12</sup>

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<sup>3</sup> See City/Freeborn Township Joint Meeting Minutes (April 10, 2012).

<sup>4</sup> *Id.*

<sup>5</sup> See Email to Perry Berg from OSA (April 17, 2012).

<sup>6</sup> See Minn. Stat. §§ 69.80 and 424A.05, subd. 3. The Freeborn Fire Fund, discussed in the OSA's March 21, 2012, letter, was deposited in Fire Account No. 2. See City/Freeborn Township Joint Meeting Minutes (April 10, 2012).

<sup>7</sup> See City Council Meeting Minutes (June 12, 2012).

<sup>8</sup> *Id.*

<sup>9</sup> See Office of the Minnesota Secretary of State Certificate of Incorporation for Freeborn Fire Department & Ambulance Relief Association (June 18, 2012).

<sup>10</sup> See City's July 27, 2012, reimbursement to Steve Seipp for \$90 payment to Secretary of State on June 18, 2012 (check number 017065).

<sup>11</sup> See Minn. Stat. § 424A.002, subd. 1.

<sup>12</sup> See Minn. Stat. § 424A.001, subd. 4 (emphasis added).

The name of the nonprofit corporation filed with the Secretary of State on June 18, 2012, is the “Freeborn Fire Department & Ambulance Relief Association.” However, the organization is not a “relief association” as that term is commonly understood or as defined by Minnesota’s volunteer firefighter pension laws. Instead, as the Fire Chief readily admitted to the OSA, the nonprofit corporation was formed solely for fundraising purposes; it was not formed for firefighter pension purposes. Therefore, although called a “relief association,” it does not have a special fund to pay pension benefits and does not otherwise comply with Minnesota’s fire relief association requirements.<sup>13</sup> It is simply a nonprofit corporation that seeks to raise funds for the Fire Department.

It is not uncommon for privately-operated nonprofit corporations to assist governmental entities by raising funds to provide equipment, programs, or services the governmental entity may otherwise be unable to provide. The nonprofits, however, are independent of the governmental entity. Examples of these nonprofits would include “education foundations” established to assist schools or “friends of the library” established to raise funds for local libraries.<sup>14</sup>

Cities are specifically prohibited from creating nonprofit corporations unless explicitly authorized to do so by law.<sup>15</sup> In addition, the Minnesota Attorney General’s Office has repeatedly concluded that, absent specific authority, local governments are not generally authorized to become members of, or donate funds to, independent organizations.<sup>16</sup>

### **The “Freeborn Fire Department” Nonprofit and the Freeborn Fire Fund**

A nonprofit “Freeborn Fire Department” was discussed in the OSA’s March 21, 2012, letter. The OSA recommended that the status of the nonprofit “Freeborn Fire Department” be resolved.

One of the Fire Department accounts turned over to the City was a Freeborn Fire Fund (also known as Fire Account No. 2).<sup>17</sup> At a joint City and Freeborn Township meeting on April 10, 2012, the City accepted a donation of the monies contained in the Freeborn Fire Fund, noted that the donated monies had been raised at Fire Department fundraisers, and acknowledged that half

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<sup>13</sup> For example, by law, the articles of incorporation or the bylaws of a volunteer firefighters’ relief association must specify that the relief association is either a defined benefit relief association subject to sections 69.771 to 69.774, 424A.015, and 242A.02, or a defined contribution relief association subject to sections 424A.015 and 424A.016. *See* Minn. Stat. § 424A.002, subd. 2. In addition, a volunteer firefighters’ relief association must have a special fund to pay pension benefits. *See* Minn. Stat. § 424A.05, subd. 1.

<sup>14</sup> *See, e.g.,* OSA’s Statement of Position on Education Foundations. The OSA’s Statements of Position are available on the OSA’s website ([www.auditor.state.mn.us](http://www.auditor.state.mn.us)).

<sup>15</sup> *See* Minn. Stat. § 465.717, subd. 1.

<sup>16</sup> *See* Letter from Assistant Attorney General Kenneth E. Raschke, Jr., to State Senators Keith Langseth and Dave Senjem, and State Representatives Morrie Lanning and Loren Solberg (June 30, 2006) (“2006 Raschke Letter”), page 6, and authorities cited in the 2006 Raschke Letter. A link to the 2006 Raschke Letter is found in the OSA’s Statement of Position on Expenditure of Public Funds on Ballot Issue Advocacy. *See also* OSA’s Statement of Position on Public Expenditures: Donations and Dues, and the League of Minnesota Cities (LMC) publication Public Purpose Expenditures, available on the LMC’s website ([www.lmc.org](http://www.lmc.org)).

<sup>17</sup> *See* City/Freeborn Township Joint Meeting Minutes (April 10, 2012) and Resolution 2012-7 (April 10, 2012).

the donated monies belonged to the Township, pursuant to a Joint Powers Agreement between the Township and the City.<sup>18</sup>

The Fire Chief recently told the OSA that the monies in the Freeborn Fire Fund were monies raised by the nonprofit “Fire Department.” As a result, the Fire Chief contends, the same people who raised the monies, the firefighters, should receive the monies to continue their fundraising and other activities through the newly created nonprofit. According to the Fire Chief, the \$2,000 recently transferred by the City to the new nonprofit will be used by the new nonprofit for any of the purposes authorized in the new nonprofit’s bylaws. None of those purposes are pension related.

The Freeborn Fire Fund monies, however, were donated to the City (and Town pursuant to a Joint Powers Agreement) in April 2012. As the OSA explained in its March 21, 2012, letter, once donated to the City, the monies become City funds. There must be specific authority for the expenditure of City funds, such as transferring monies to the new nonprofit or paying for the nonprofit’s filing fees, and City funds may only be used for a public purpose.

### **Recommendations**

The OSA knows of no authority for the City to make a \$2,000 donation to, or to pick up costs associated with the creation of, the “Freeborn Fire Department & Ambulance Relief Association” nonprofit fundraising corporation.

If the nonprofit “Fire Department” believes some portion of the Freeborn Fire Fund was erroneously donated to the City in April 2012, the nonprofit would need to consult with its own attorney to determine whether any steps could be taken at this late date to rescind a portion of the donation. The City, Town, and the nonprofit “Fire Department” would need to negotiate any such rescission.

If the City provided the \$2,000 to the newly-created nonprofit, and reimbursed the Fire Chief for the \$90 filing fee, with the understanding that the Freeborn Fire Department & Ambulance Relief Association was a “relief association” as that term is commonly understood or as defined by Minnesota’s volunteer firefighter pension laws, the OSA recommends that the City seek reimbursement of those monies.

The OSA is also concerned that the name “Freeborn Fire Department & Ambulance Relief Association” may be misleading since this nonprofit corporation is not a “relief association” as that term is commonly understood or as that term is defined by Minnesota law. It appears the name could be confusing to potential donors and to others.<sup>19</sup> For example, a city with a relief association that complies with Minnesota’s volunteer firefighter pension laws, must forward

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<sup>18</sup> See City/Freeborn Township Joint Meeting Minutes (April 10, 2012) and City Resolution 2012-7 (April 10, 2012). The City Attorney was present at the Joint Meeting.

<sup>19</sup> A less misleading name, for example, might be the Freeborn Fire Department Foundation or something similar.

Mayor Beckmann and Fire Chief Seipp  
City of Freeborn Fire Department  
October 23, 2012  
Page 5

State Fire Aid to the relief association.<sup>20</sup> The Freeborn Fire Department & Ambulance Relief Association, however, is not eligible to receive the State Fire Aid because it does not have a pension component or otherwise comply with Minnesota's volunteer firefighter pension laws.

The OSA commends the City for the steps it has taken to resolve many of the issues discussed in the OSA's March 21, 2012, letter. We urge the City to continue its deliberations about whether a pension plan for its volunteer firefighters should be established. Some cities, for example, decide to pay their volunteer firefighters per call, rather than establishing a pension plan for the firefighters. If the City decides to establish a pension plan, the plan could be offered through either: 1) a relief association that complies with the firefighter pension laws; or 2) the PERA statewide volunteer firefighters' plan. If the City chooses the statewide volunteer firefighters' plan, there would be no need for a relief association.

Additional information about fire relief associations and pension plans is available on the OSA's website ([www.auditor.state.mn.us](http://www.auditor.state.mn.us)) and PERA's website ([www.mnpera.org](http://www.mnpera.org)).

## **Conclusion**

The OSA knows of no authority for the City to expend City funds to make a \$2,000 donation to, or to pay the Secretary of State filing fees for, the nonprofit "Freeborn Fire Department & Ambulance Relief Association" fundraising organization.

If you have any questions about this matter, 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 Rose Hennessy Allen, the OSA's Pension Director at 651-296-5985 or [Rose.Hennessy-Allen@osa.state.mn.us](mailto:Rose.Hennessy-Allen@osa.state.mn.us).

Sincerely,

*/s/ Nancy J. Bode*

Nancy J. Bode  
Assistant Legal Counsel

cc. Ms. Tiffany Krueger, City Clerk/Treasurer  
Mr. Perry Berg, City Attorney  
The Honorable Steve Ausen, Town of Freeborn Board of Supervisors  
Ms. Rose Hennessy Allen, OSA Pension Director

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<sup>20</sup> See, e.g., Minn. Stat. §§ 69.031, subd. 5(a) and 424A.05, subd. 2 (city treasurer must transfer State Fire Aid to the related relief association's treasurer within 30 days of receipt; the aid must be deposited in the relief association's special fund).