



OFFICE OF THE
CITY ATTORNEY

DEPARTMENTAL CORRESPONDENCE



Kit Williams
City Attorney

Blake Pennington
Assistant City Attorney

Jodi Batker
Paralegal

TO: **Mayor Jordan**
City Council

CC: **Martha Sharkey, MD, FAAP, City Health Officer**
Susan Norton, Chief of Staff
Paul Becker, Finance Director
Fayetteville City Board of Health

FROM: **Kit Williams, City Attorney**

DATE: **July 23, 2021**

RE: **Possible Payment to City Health Officer**

Resolution 173-20 passed by the City Council on June 24, 2020, reestablished the office of the City Health Officer in Section 2 of the Resolution. In Section 4 of the Resolution, the City Council approved "a budget adjustment in the amount of \$50,000.00 for staffing, supplies, and other needs of the City Health Officer and the City Board of Health in the course of their work." These funds could be spent by the Administration pursuant to requests of the City Health Officer or City Board of Health or other needs related to the Covid-19 emergency. I believe that substantial amounts were spent to provide free masks to businesses to help them comply with the City's mask mandate as well as the purchase of a special low temperature freezer for storage of vaccines. The remaining funds were rebudgeted for 2021.

A.C.A. §14-262-103 **City health officer** provides in (e) "The compensation of the city health officer shall be fixed by the mayor and council..." The Resolution did not fix any compensation for the City Health Officer, but did appropriate \$50,000.00 that the Administration could use for "staffing, supplies and other needs..." I believe that the City of Fayetteville has the statutory right to pay compensation to the City Health Officer.

I do not believe that other past City Health Officers of the City of Fayetteville have been paid. On the other hand, no previous City Health Officers (in recent times anyway) have served during a pandemic emergency nor have been nearly as active and engaged as Dr. Sharkey. I am unaware of any request by Dr. Sharkey for any payment for any of her activities during her first year of service as City Health Officer. With no request for compensation, it was not illogical to assume she intended her services to be as an unpaid volunteer just as how her predecessors as City Health Officers had served.

Normally any professional (engineer, doctor, etc.) seeking to be hired as an independent contractor for the City must be selected by a professional selection committee pursuant to state statutory procurement requirements. The particular statute authorizing the selection of a City Health Officer provides that the mayor shall "(A) . . . elect a qualified person to the office of city health officer if the governing body of the City creates the office. (B) The appointment shall be approved by a majority of the votes of the city or town council." A.C.A. §14-262-103(c)(1) This very old state statute which is very specific as to how a City Health Officer is selected may control over the more general state professional selection statutes that normally control professional hiring. This would be especially true if the proposed compensation was fairly small. Once the possible compensation would exceed the \$50,000.00 authorized by the City Council for "staffing, supplies and other needs", I believe it would be prudent to undergo the statutorily required professional selection regulations. Additionally, if any federal funds would be used for the City Health Officer's compensation, I believe that the City would have to follow all Federal Procurement rules and should proceed under normal professional selection statutes to ensure the City's expenditures would not violate Federal standards.

Since Dr. Sharkey did not request any salary or other compensation during her first year of service, the City did not pay her anything nor was any revenue (beyond the remainder of the original \$50,000.00) rebudgeted or appropriated for any possible salary or compensation for Dr. Sharkey or other expenses of the City Board of Health in the 2021 budget approved by the City Council. No job description apart from what the state statutes described in very general terms was provided as it appeared from her lack of request for compensation that Dr. Sharkey was volunteering her quality services for no monetary compensation.

I have now been provided Dr. Sharkey's letter dated July 13, 2021 to Mayor Jordan with copies to the City Board of Health. Dr. Sharkey confirms that she "opted not to take a salary in order to preserve funds to fight the pandemic." Then Dr. Sharkey states in bold in her letter "**Knowing that City is receiving \$17.9 million that is supposed to be used to address the public health emergency and specifically to support local public health endeavors, I would be doing a disservice to the City Health Officer role not to request more funding.**"

I should note that Finance Director Paul Becker has informed me and probably Mayor Jordan that he does not believe any of the recent federal funding could be used for non-contracted past services. He also believes use of normal professional selection committee as required by state procurement law would be needed to use federal funds to finance a future contract for the City Health Officer.

The City of Fayetteville can pursuant to A.C.A. § 14-262-103 (e) provide its City Health Officer "compensation." There is no authority to pay any compensation to any member of the City Board of Health. If the City Council and the Administration wish to change Dr. Starkey's status from volunteer to paid contractual consultant or even City

employee, it can compensate Dr. Sharkey for future services. Dr. Sharkey should go through the statutory professional selection process if she would be seeking a substantial contractual amount for her proffered services. I believe that the City could legally fund the City Health Officer's position either as an independent contractor or City staff member for **future services**.

Attempting to compensate Dr. Sharkey during the period she had "opted not to take a salary" (Dr. Sharkey's letter of July 13, 2021 to Mayor Jordan) is a more difficult legal proposition. The City of Fayetteville would have been in a much more clearly legal position to compensate Dr. Sharkey if she had informed the City that she needed or desired compensation when she was appointed or within a few weeks of the beginning of her service. A professional selection committee would likely have agreed with the Mayor that Dr. Sharkey was the most qualified doctor for this position. A contractual agreement for a particular amount of compensation and specified duties and expectations could have been agreed to by Dr. Sharkey and presented to the City Council for its approval and appropriation of necessary funds. As Dr. Sharkey had "opted not to take a salary" nor seek a contract payment as an independent contractor, the City did not believe any contract was necessary or appropriate.

Because, Dr. Sharkey did originally opt to not to take a salary or otherwise request any compensation, can the City, a year later, legally and constitutionally pay Dr. Sharkey for her obviously good work and efforts during the first part of the Covid-19 pandemic?

First, the City must follow *Article 12 §5(a) of the Arkansas Constitution*: "No county, city...shall...obtain or appropriate money for... any corporation, association, institution or individual." Obviously, the City does issue checks for corporations and individuals with which the City has contracted for services or goods. However, when there has been no contract for services agreed upon, a City cannot pay a person for their good works without legal justification. For example, the City cannot decide that the good advice from the citizen volunteers on the Environmental Action Committee means all these volunteers should be paid for their past civic efforts. The Arkansas State law only authorizes one municipal citizen committee to be eligible for compensation, the Planning Commission. Attempting to pay other volunteer citizen committees (especially for past work) would almost certainly violate. *Article 12 §5 (a) of the Arkansas Constitution*. This constitutional provision along with *Article 16 §13 Illegal exactions* are intended to prevent an over-generous City from paying a person or business without a proper contract or other legal justification for such expenditure.

"Sullivan brought this suit as an illegal exaction under Article 16, Section 13 of the Arkansas Constitution. We recognize two types of illegal-exaction suits: 'public funds' cases and 'illegal-tax' cases. A 'public funds' case involves the prevention of a misapplication of public funds or the recovery of funds wrongfully paid to a public official, and taxpayers are entitled to broad relief. We have previously recognized that the recovery of an

unauthorized payment of attorney's fees from public funds is an appropriate illegal-exaction claim." *City of West Helena v. Sullivan*, 353 Ark. 420, 108 S.W. 3d 615, 617 (2003) (citations omitted).

This case illustrates why it is important that the City of Fayetteville ensures that any payment for professional fees must be properly authorized by law.

"'Illegal Exaction' under the Arkansas Constitution means both direct and indirect illegal exactions, thus comprehending any attempted invalid spending or expenditure by any government official."

"Illegal Exaction means far more than the mere collection of unlawfully levied taxes. With little limitation, **almost any misuse or mishandling of public funds may be challenged by a taxpayer action.** Even paying too much for cleaning public outhouses has been held by our courts as basis for a taxpayer's right to relief." *Starnes v. Sadler*, 237 Ark. 325, 372 S.W. 2d 585, 587 (1963) (citations omitted) (emphasis added).

Unjust Enrichment and Quantum Meruit

"Quasi-contracts, or contracts implied in law, are legal fictions, created by the law to do justice. The underlying principle is that one person should not unjustly enrich himself at the expense of another. To find unjust enrichment, a party must have received something of value, to which he was not entitled and which he must restore. There must also be some operative act, intent, or situation to make the enrichment unjust and compensable. The basis for recovery under this theory is the benefit that the party has received and it is restitutionary in nature. Recovery may be had under quasi-contract where services have been performed, whether requested or not, which have benefitted a party. **Courts, however, will only imply a promise to pay for services where they were rendered in such circumstances as authorized the party performing them to entertain a reasonable expectation of their payment by the party beneficiary.**" *Farmer v. Riddle*, 2011 Ark. App. 120, 2 (citations omitted) (emphasis added).

The City of Fayetteville has used this theory to justify paying an engineering firm for work requested by City staff for similar work done pursuant to an existing contract, but beyond the initial contract's scope and dollar amount authorized by City Council Resolution approving the contract. We sought to avoid this solution in the future by requiring a clause in every similar contract to state that there would be no payment for any services beyond the scope or price of the approved contract without the express agreement of the City Council. We have not had to consider Unjust Enrichment or Quantum Meruit again for about 18 years until today.

"We find that the unjust enrichment principle is firmly embedded in Arkansas law in the context of work performed pursuant to illegal contracts made by political subdivisions such as cities and counties. We alluded to it as recently as 1980 in a case where we ultimately found a valid contract to exist. We have permitted restitution based on unjust enrichment even when the associated contract was 'void.'"

"When the recovery is based on unjust enrichment, as opposed to damages for loss occasioned by breach of contract, **the award is measured by the value of the benefit conferred upon the party unjustly enriched.**" *McDaniel v. State*, 726 S. W. 2d 679 (1987) (emphasis added).

In order for the City Council to agree to recognize an unjust enrichment or quantum meruit payment to Dr. Sharkey, it must receive evidence from Dr. Sharkey that the City, City Board of Health and/or citizens of Fayetteville benefitted in a particular dollar amount from her work. This evidence needs to be as documented and specific as possible and much more detailed than Dr. Sharkey has provided in her letter of July 13, 2021. The Arkansas Supreme Court rejected an unjust enrichment or quantum meruit claim by an architectural firm for its work because it failed to prove "that Bradley County did indeed benefit from the architectural services." *Sanders v. Bradley County*, 330 Ark. 675, 683 (1997).

"A claimant seeking restitution for unjust enrichment can generally recover the value of the benefit conferred upon the party unjustly enriched. The claimant's burden is to 'produce evidence permitting at least a reasonable approximation of the amount of the wrongful gain.' 'If the claimant's evidence will not yield even a reasonable approximation, the claim of unjust enrichment is merely speculative, and disgorgement will not be allowed...[and] the claimant's burden of proof, so described, is ordinarily met as soon as the claimant presents a coherent theory of recovery in unjust enrichment.'" *Hartness v. Nuckles*, 2015 Ark. 444 at 8; 475 S.W. 3d 558, 564 (2015).

CONCLUSION

There are two issues that will need to be decided by the City Council. The first issue is whether the City can pay Dr. Sharkey for the value of her previous services to the City, City Board of Health and citizens received from the date of her appointment until the current date. To authorize payment the City Council will need to review evidence provided by Dr. Sharkey to determine the follow questions:

1. Has the City, City Board of Health and citizens received something of value and more importantly has Dr. Sharkey presented evidence to show the value to the City of the services she has rendered that is a reasonable approximation rather than speculative?
2. Is there some operative act, intent or situation to make the enrichment (to the City) unjust and compensable?
3. Were these services rendered in such circumstances as authorized Dr. Sharkey performing them to entertain a reasonable expectation of their payment by the City?

If all of these questions are answered in the affirmative by the City Council, then the City Council will need to evaluate the claimed value of services rendered by Dr. Sharkey to determine what the Council believes to be the proper fair amount of compensation that Dr. Sharkey has proven herself to be justified to receive.

The second issue is prospective. Does the City Council desire to fund an independent contractor to occupy the position of City Health Officer? If so, I recommend we immediately begin a professional selection process in compliance with normal state procurement law and Federal regulations so that we can safely pay the City Health Officer with the federal recovery funds.