

STATE OF TENNESSEE

LIMITED REVIEW OF THE
OFFICE OF COUNTY TRUSTEE
SHELBY COUNTY, TENNESSEE

FOR THE PERIOD JULY 1, 2001, THROUGH JANUARY 31, 2003



COMPTROLLER OF THE TREASURY

Department of Audit

Division of County Audit

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OFFICE OF COUNTY TRUSTEE
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**COMPTROLLER OF THE TREASURY
DIVISION OF COUNTY AUDIT**



**STATE OF TENNESSEE
COMPTROLLER OF THE TREASURY
DEPARTMENT OF AUDIT
DIVISION OF COUNTY AUDIT
SUITE 1500
JAMES K. POLK STATE OFFICE BUILDING
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PHONE (615) 401-7841**

August 6, 2004

The Honorable Bob Patterson
Shelby County Trustee
160 N. Main, Suite 300
Memphis, Tennessee 38103

Dear Mr. Patterson:

We have performed a limited review of the Shelby County Trustee's Office for the period July 1, 2001, through January 31, 2003.

The report on the results of our limited review is attached. It presents three findings and recommendations in the areas of operating expenditures paid from the trustee's commission account, the inappropriate use of funds from the commission account, and the lease of a vehicle without statutory authority. We reviewed these findings and recommendations with you, and you responded in writing. Your responses to these findings and recommendations have been included in the report.

We appreciate your office's professionalism and cooperation during our review.

Sincerely,

Richard V. Norment
Assistant to the Comptroller

xc: Honorable A. C. Wharton
Shelby County Mayor

Honorable Marilyn Loeffel
Chairperson of the County Commission

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FINDING 1 OPERATING EXPENDITURES WERE PAID FROM THE TRUSTEE'S COMMISSION ACCOUNT IN VIOLATION OF STATE STATUTE AND A RESOLUTION OF THE COUNTY COMMISSION

The trustee inappropriately paid all expenses of his office from the commission account. On June 3, 1991, the Shelby County Commission passed a resolution adopting provisions of Section 8-22-104(a)(3), Tennessee Code Annotated (TCA). This statute provides for all officials, including the trustee, listed in Section 8-22-101, TCA, to turn over "all fees allowed, collected, or in any manner received" to the county on a monthly basis. This statute provides for the county to pay all expenses, including salaries, of the county officers and their deputies. The resolution further provides for purchases to be made through the county's centralized purchasing system and for the expenditures to be paid by warrants signed by the county mayor and director of finance and administration.

RECOMMENDATION

The trustee should remit to the county all commissions earned on a monthly basis, as required by Section 8-22-104(a)(3), TCA. All office purchases should be made through the county's centralized purchasing system, and all office expenses should be paid by warrants signed by the county mayor and director of finance and administration.

MANAGEMENT'S RESPONSE

The Trustee is permitted under both Tennessee state law and Shelby County Home Rule Charter to perform his purchasing function and to remit his excess fees to Shelby County. A summary of both Shelby County and state of Tennessee provisions are outlined below.

Shelby County Authority

- 1) The Constitutional Home Rule Charter for Shelby County was enacted in 1984 and is our current form of government. The Charter separates the County's legislative, executive and judicial functions. The intent of the Shelby County Charter is to structure the activities of the Mayor and the Commissioners while separating the duties and activities of the elected officials. The Charter is clearly written to prohibit diminishing the duties of the elected officials. The Charter states:

"The duties of the constitutional County officers as prescribed by the general assembly shall not be diminished under this Charter..."

(Charter, 6.04)

The Charter cannot be changed except by vote of the citizens of Shelby County. The voters of Shelby County have changed the Charter twice in the last two decades.

- 2) Shelby County currently has an ordinance that allows the Trustee to perform his own purchasing. The ordinance reads as follows:

“Other provision of this chapter notwithstanding, any other elected county official may avail himself of the services of the county purchasing agent for his purchasing or may perform his own purchasing in the manner herein provided.” (Shelby County Code, Sec. 2-65).

This ordinance originated from the Private Acts of 1974, Ch 260, § 4.03 (17). This Act was amended 13 different times and each time this provision remained intact. Later when the Home Rule Charter changed the County’s form of government this provision once again remained unaltered. As demonstrated, the commitment to separation of duties between the Mayor, Commissioners and elected officials was constant throughout the evolution of Shelby County government.

- 3) Finally the resolution as referenced in the finding above did not amend the Charter nor did it amend the ordinances governing purchasing in Shelby County. The Board of County Commissioners is permitted to establish purchasing policies for the Mayor and his administrative departments by ordinance, not by resolution as stated.

“By ordinance, the Board of County Commissioners shall establish purchasing procedures and/or rules and/or regulations for all purchases, sales and contracts for services through competitive bids or otherwise” (Charter,2.02(C)).

Thus the resolution approved on June 3, 1991, was enacted in a manner that did not follow the procedures for amending an ordinance, therefore, the action was ineffective at changing any purchasing procedures for the Mayor and his administrative departments. As previously pointed out, the Home Rule Charter nor this resolution affects the operations of the Trustee.

Tennessee Authority

- 1) The Trustee is a state Constitutional officer and his duties are governed extensively by statutory regulation. He takes an oath to support the constitution of the state and of the United States and an oath of faithful performance of the duties of the office. His oath does not reference the Shelby County Charter.
- 2) Tennessee Code Annotated § 8-22-107 provides authority for the Trustee to perform purchasing functions. The statute specifically allows the Trustee as a constitutional officer to purchase “all necessary books, stationery, office equipment, stamps, and supplies of all kinds...”
- 3) The Trustee has always reported all commissions and expenses on a monthly basis. All commissions net of expenses are transferred to the county on the 10th of each month. Authority for such action is outlined in Tennessee Code Annotated § 8-22-104 (a)(2) which states the Trustee shall remit “fees, commissions, and charges

collected by such officer in the preceding quarter and due the county in excess of such officer's salary, together with the salaries of deputies and assistants and the expenses of the office as provided by law".

Summary

Each year the Trustee is required to submit an operating budget. According to the County Charter, Section 3.07 (b) a copy of the Trustee's budget is provided to the Mayor for the consolidation purposes only. The County Commission then approves the consolidated budget. The Trustee's budget is not subject to approval outside the County Commission. Consequently the executive branch of the county has no legal authority over the Trustee's budget.

Once the budget is approved it is the responsibility of the Trustee to adhere to the budget as passed by the County Commission. The Trustee has followed that requirement since election in 1990. Under the present purchasing policies, the Trustee has been able to provide efficient and cost effective service to the taxpayers. Planning and implementation has been accomplished in a timely fashion to keep pace with the changing needs of our citizens. Purchasing policies are continually reviewed and updated and are open for review to both internal and external auditors.

REBUTTAL

The resolution approved by the County Commission on June 3, 1991, was not an amendment to the Shelby County Charter or an ordinance. The Board of County Commissioners approved the resolution under authority of Section 8-22-104(a)(3), TCA. This state statute grants authority to the County Commission to make the necessary appropriations to pay all expenses for the operation of the Trustee's Office, and in such an event all fees shall be paid to the county monthly. It should be noted that the Shelby County attorney has opined that all elected officials must remit their fees to the county's General Fund and that all expenses of those officials should be paid from the county's General Fund, as set out in the resolution passed on June 3, 1991.

Additionally, management's response refers to Section 8-22-107, TCA. Contrary to the trustee's position, this section does not allow the Trustee's Office to perform the purchasing functions. Section 8-22-107(b), TCA, which specifically applies to Shelby County, provides for:

...all necessary books, stationery, office equipment, stamps and supplies of all kinds used in the conduct of the various offices of the elected county officers enumerated in this chapter shall be furnished and paid for by the county, including premiums on official bonds executed by such officers named in Section 8-22-101, and all such purchases shall be accomplished through a centralized purchasing procedure in that county pursuant to the applicable laws relative to that county for purchasing. No official or officer enumerated in Section 8-22-101 shall be entitled to purchase any of the aforementioned items for the officer's office by using the fees, commissions or emoluments collected by the officer.

The trustee should remit to the county all commissions earned on a monthly basis, as required by Section 8-22-104(a)(3), TCA, and all office purchases should be made through the county's centralized purchasing system, as required by Sections 8-22-104(a)(3) and 8-22-107(b), TCA.

FINDING 2 FUNDS FROM THE COMMISSION ACCOUNT WERE USED INAPPROPRIATELY

The office used commission account funds inappropriately. Our review revealed the following:

- A. The Trustee's Office disbursed \$11,121.95 from the commission account for (1) three employees to pursue college degrees - one in electronic management (\$2,033.75), one in nursing (\$4,098.17), and one in business administration (\$1,642.00); (2) a certified public accountant review course, textbooks, and exam fee (\$730.00); (3) a real estate course, textbooks, and exam fee (\$792.03); and (4) a certified cash manager exam fee and review course (\$1,826.00). The county has not adopted written policies for paying these types of expenses for employees. Furthermore, the use of county funds to pay for an employee of the Trustee's Office to receive a nursing degree is questionable.
- B. The office disbursed \$29,675.90 from the commission account for expenses relative to obtaining legal status for two foreign nationals to work in the Trustee's Office. These payments were made to a law firm. Certain expenses paid to the United States Office of Immigration and Naturalization Service (INS) are required to be paid by the employer. We did not determine if the law firm paid any of these expenses to the INS. Any required employer expenses paid to the INS on behalf of the two employees would be an appropriate use of county funds. However, other expenses paid to the law firm on behalf of the two employees would be personal expenses and not a proper use of county funds.

The Shelby County attorney has opined in a written communication to the county trustee that these expenditures are personal and should not be paid by the county. Furthermore, the county attorney stated that the county should be reimbursed for these expenditures.

RECOMMENDATION

These deficiencies should be corrected by doing the following:

- A. The county should adopt a policy outlining the circumstances for which county funds can be used to pay for employees' college expenses, certification examination fees, review courses, and textbooks. The policy should state that the expenses should relate to an individual's job function. The county also may want to enter into a contract with the employee requiring that employee to work for the county a certain length of time after payment of the expenses. If the employee leaves before the contracted time expires, then the employee should reimburse the county for the expenses the county paid on the individual's behalf.

- B. County officials should determine if any portion of the \$29,675.90 represents required employer payments to the INS on behalf of the two employees. Any such payments would be an appropriate use of county funds. Payments made to attorneys for their services are not an appropriate use of county funds. The two employees should reimburse Shelby County for expenses that are not an appropriate use of county funds.

MANAGEMENT'S RESPONSE

Management stated the following:

- A. The audit recommendation states that the county should adopt a policy regarding payment for an employee's college expenses, Shelby County Trustee Policy Number "Adm 122.02" effective on September 1, 1990 and revised May 16, 2003 addresses the concerns outlined in the audit:

"Education of all types must be pre-approved by the Trustee and must meet the following criteria:

- 1) The education must be beneficial to the Trustee's Office and/or Shelby County Government
- 2) The employee requesting education must be hired in a full time permanent status
- 3) The employee must have successfully completed the probationary period
- 4) The course must be taken from an accredited institution."

The Trustee supports training for his employees. The intent of this policy is to recognize that pursuit of advanced degrees enhance personal development in communication, leadership, and strategic decision-making. These skills will ultimately benefit the employee, the office of the Trustee and Shelby County in general.

Taken in order of concern:

- 1) The employee listed as pursuing a degree in electronic management has been employed with Shelby County for 11 years and with the Trustee for 4 of those years. She is a supervisor in our remittance department. She is responsible for all payments including those submitted electronically over the website, i.e., credit card, and E-check. She has been instrumental in implementation of new systems, which provide for electronic payments. She is directly responsible for the compliance of these systems to state statutory requirements, bank regulations, and NACHA operating rules. She is in the process of implementing a new electronic payment process called point of purchase. Her effort at obtaining this degree is job related and within prescribed policies.

- 2) The employee listed as pursuing a nursing degree has been with the county for a total of 15 years, 7 years with the Shelby County Health Department and 8 years with the Trustee. She has since finished her degree and is a supervisor in our new digital imaging department. The advanced study by this individual sharpened analytical and technical skills currently at use in the digital imaging environment. While the Trustee benefits daily from the employee's knowledge and experience, the advanced degree extends options to put those skills and knowledge to use in other areas of the county. Her effort at obtaining this degree is within prescribed policies.
- 3) The business administration degree, CPA review, real estate course, and the Cash Management certification are job related and within prescribed policies.

The office of Comptroller of the Treasury, State of Tennessee, sent us a copy of their current education policy. Our intent is to use the state's policy as a guide for future enhancements to our current policy. In particular, we plan to 1) adopt the use of a contract to obtain an employment commitment from any employee requesting tuition reimbursement and 2) pay for training and education that is directly related to the daily operations of the Trustee's office.

- B. All legal expenses incurred by the Trustee are work related as outlined below.

In 1998-1999 the Trustee purchased a new accounts receivable system that was Year 2000 (Y2K) compliant. Unfortunately before the system could be completely installed and tested, the vendor filed bankruptcy. The source code was obtained through the bankruptcy proceedings. In 2000, another company was hired to complete the installation and finish some of the priority customization outlined in the original bid. In 2001, the decision was made to hire internal programmers to continue the customization and provide ongoing support for our system. Unfortunately 2001 was a bad time to hire programmers due to the Y2K scare. Software programmers were hired as quickly as they became available. In addition, the prevailing wage was well above what Shelby County could offer as an incentive. As a result of the Trustee's immediate need for programmers and the shortage of available programmers at the time, the Trustee hired 3 foreign nationals, Chekib Kchouk, Liyu Chen and Gopika Krishna. In order to work in the United States, foreign nationals must have a H1-B for a temporary work status and then a "green card" if they desire a permanent work status. With a "green card", the foreign national can work legally in the United States.

The Trustee has incurred legal expenses to obtain an H1-B for Liyu Chen and Chekib Kchouk. The Trustee is sponsoring Chekib Kchouk to obtain a green card in order to work in the United States. This status will be achieved when the U. S. Department of Labor provides "Labor Certification". To obtain this certification, the employer must prove to the Department of Labor that the local pool of American workers was insufficient to fulfill the requirements for the job. Therefore, the employer (in this case is the Trustee) had to hire a foreign national. The requirements are strict and the

certification difficult to obtain. However, the Trustee has received the Labor Certification for Mr. Kchouk.

REBUTTAL

We rebut the following:

- B. In the absence of a policy establishing allowable expenses to be paid on behalf of employees seeking to obtain legal work status, the county attorney has opined by written communication that these are personal expenditures and should not be paid by the county and that any such expenses already paid by the county should be reimbursed to the county. The county attorney should make any further determinations as to whether any of the specific legal expenses addressed in management's response are obligations of Shelby County.

FINDING 3 THE TRUSTEE ENTERED INTO A LEASE AGREEMENT FOR A VEHICLE WITHOUT STATUTORY AUTHORITY

The trustee entered into a 36-month lease for a vehicle with a total lease obligation of \$22,047.72. Our examination disclosed the following deficiencies in this lease agreement:

- A. The County Commission did not approve the lease agreement. Section 7-51-904, Tennessee Code Annotated (TCA), requires lease agreements to be approved by the Board of County Commissioners.
- B. The county mayor or the mayor's designee did not enter into the lease agreement. Section 3.03(n) of the county charter provides that the county mayor or the mayor's designee shall have "the sole power and authority to enter into contracts on behalf of Shelby County."
- C. This lease agreement was not entered into in compliance with normal purchasing procedures of Shelby County, and it bypassed the Shelby County Purchasing and Contract Office. As noted in Finding 1, the trustee pays numerous expenses from the commission account in violation of state statute and a resolution of the County Commission. By entering into this lease agreement directly and paying for the lease from the commission account, the trustee bypassed controls established by state statute and Shelby County government.

RECOMMENDATION

All lease agreements should be approved by the County Commission, as required by Section 7-51-904, TCA, and should be entered into by the county mayor, as required by Section 3.03(n) of the county charter. Furthermore, lease agreements should be processed through the Shelby County Purchasing and Contract Office, as required by Shelby County purchasing procedures.

MANAGEMENT'S RESPONSE

Management stated the following:

- A. The County Commission by resolution did approve the Trustee's lease of a vehicle by way of approval of the Trustee's budget for 2002-2003. The funds for the vehicle were appropriated in a specific line item called "equipment rental". This line item was more than sufficient to cover the lease of a vehicle. The Commission's approval of the Trustee's budget indicates approval of the Trustee's lease within the "equipment rental" line item.
- B. In addition, by Shelby County Code § 2-65 an elected official may perform his own purchasing. Shelby County Code § 2-57 allows the administrator of purchasing to delegate purchasing authority "after an appropriate bond is maintained".

The Shelby County Home Rule Charter was structured to govern the activities of the Mayor and the administrative departments working under the Mayor's authority. Other elected officials are given the responsibility and the authority to perform the duties of their office as outlined by Tennessee statutes.

- C. In summary, the Trustee felt that proper statutory authority existed to support entering into a lease agreement. Only recently has any state law as relating to lease agreements been disclosed to the Trustee. Our intent is to fully comply with this law.

REBUTTAL

We rebut the following:

- A. The approval of the trustee's budget does not constitute approval of a lease as required by Section 7-51-904, TCA.
- B. Please refer to our rebuttal presented in finding number 1.