

# Memorandum

## THE MCHENRY COUNTY STATE'S ATTORNEY'S REPORT REGARDING ALLEGATIONS OF CRIMINAL CONDUCT ON THE PART OF ROBERT MILLER, FORMER HIGHWAY COMMISSIONER AT THE ALGONQUIN TOWNSHIP ROAD DISTRICT



May 31, 2018

## Foreword:

This report is meant to inform the public of the basis upon which the McHenry County State's Attorney's Office declined to prosecute Robert Miller, former Highway Commissioner at the Algonquin Township Road District, after investigating various allegations of public corruption and misuse of public funds.

Generally speaking, a State's Attorney does not investigate criminal allegations. Rather, the primary function of the State's Attorney is "[t]o commence and prosecute all actions, suits, indictments, and prosecutions, civil and criminal, in the circuit court for his county, in which the people of the State or County may be concerned." While a State's Attorney does have the authority to investigate criminal matters, this authority is limited in that the State's Attorney must ordinarily rely on police agencies to conduct criminal investigations. As stated by the Illinois Supreme Court:

[A State's Attorney's] duty to investigate is not exclusive and necessarily involves him with other investigative agencies. Justice is not served when the State's Attorney's duty to investigate collides with the duty of the police to investigate. The State's Attorney does not possess the technical facilities nor the manpower that the police have. Consequently, it is the recognized practice that the State's Attorney sensibly defers to the investigative duties of the police.

As such, the Illinois Supreme Court permits the State's Attorney to investigate criminal matters only "where other law enforcement agencies inadequately deal with such investigation or where a law enforcement agency asks the State's Attorney for assistance."

In this case, the two law enforcement agencies with jurisdiction to investigate Miller were the McHenry County Sheriff's Office and the Illinois State Police. Both declined to investigate and tendered the investigation to the State's Attorney's Office. It is important to understand how taxing this investigation has been on the resources of our Office as it is neither staffed nor resourced to conduct such an expansive investigation. We employ lawyers, not detectives. Our Office has only one full-time investigator who is a sworn peace officer and has experience conducting criminal investigations.

The investigation required us to consider a convulsion of indiscriminate allegations that, regrettably, first surfaced in the press. In order to thoroughly examine these allegations, we issued dozens of subpoenas, reviewed over 10,000 emails, analyzed thousands of pages of financial and Township documents, and conducted dozens of interviews. After devoting nearly seven months and hundreds of man-hours, we regard our investigation as complete and thorough.

It must be said that our investigation was undermined by the public nature of the allegations. An element of candor was lost when interviewing witnesses who had time to prepare their responses to anticipated questions, as opposed to answering extemporaneously. Moreover, a number of witnesses refused to speak with us as they did not want to involve themselves in the evolving spectacle.

It must be said further that this Office has faced pressure from members of opposing political factions to variously charge Miller or exonerate Miller, hasten the investigation or abandon the investigation, retain the investigation in house or refer the investigation to another entity. Particularly troubling were those voices that, not having access to all information and being politically opposed to Miller, stridently urged our Office to put a man's liberty in jeopardy.

All of this betrays a fundamental misunderstanding of the State's Attorney's Office and its function. The United States Supreme Court has defined the role of the prosecutor as follows:

The [government attorney] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

United State Supreme Court Justice Robert Jackson, pondering the question of what makes a good prosecutor, observed further:

The qualities of a good prosecutor are as elusive and as impossible to define as those which make a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizens' safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, *who serves the law and not factional purposes* and who approaches his task with humility.

As recent history in this County has demonstrated, politically-saturated prosecutions of public officials, represented publicly as airtight, can prove incredibly costly to the public and, after being subject to the intense scrutiny of an adequate criminal defense, disreputable upon being deemed unfounded.

It is essential that the duty to “seek justice” is first and rigorously applied at the time a State’s Attorney is making a charging decision. This is especially true when considering criminal allegations against the infamous or unpopular.

Criminal prosecutions, which bring to bear the incredible power of the State directly down upon an individual, can have enormous financial, health, and social consequences for that individual. Accordingly, a State’s Attorney must only seek a criminal prosecution if he has a moral certainty that the suspect committed the criminal offense, has a moral certainty that admissible evidence will be sufficient to prove the offense beyond a reasonable doubt, and believes the decision to charge is in the public interest.

When determining whether the prosecution is in the public interest, the American Bar Association has recommended that a State’s Attorney consider, among other things:

- 1) the extent or absence of harm caused by the offense;
- 2) the impact of the prosecution or non-prosecution on the public welfare;
- 3) the criminal background and characteristics of the offender; and
- 4) whether the public’s interest in the matter might be appropriately vindicated by available civil, regulatory, administrative, or other private remedies.

When making a charging decision, it is not enough to say that the prosecution itself, irrespective of outcome, is in the public interest in the sense that it “sends a message” to others who might consider similar conduct. It is not enough to say that the prosecution will help resolve unsettled legal issues. It is not enough to say, “charge him and let the jury decide.” An individual’s liberty and freedom cannot be sacrificed for the good of the whole when a prosecutor has a reasonable doubt as to guilt.

A State’s Attorney can neither be swayed by the logic that the sheer number of allegations of wrongdoing against a suspect evidences criminal conduct. Perhaps not without significance, many witnesses we spoke with leveled a number of accusations of criminal conduct against the current Highway Commissioner, which have not been subject to the same media scrutiny. That notwithstanding, in criminal cases, with the exception of charges involving sexual abuse and domestic violence, a person’s dishonorable character, prior criminal history, or prior “bad” conduct is not admissible evidence. Rather, the inquiry focuses solely on the sufficiency of evidence related to the specific criminal act charged. Each allegation, therefore, must be evaluated on its own merits and the combined persuasive force of a number of allegations, which individually do not arise to proof beyond a reasonable doubt or otherwise merit prosecution, is irrelevant.

Proof beyond a reasonable doubt is no small hurdle. Everyone charged with a crime is presumed to be innocent of the charges against him. This presumption

remains with him throughout every stage of the trial and during a jury's deliberations on the verdict and is not overcome unless the jury is convinced beyond a reasonable doubt from all the evidence that he is guilty. It is the State's burden of proving a defendant guilty beyond a reasonable doubt and the defendant is not required to prove his innocence nor offer any evidence in his defense.

Generally, a public official accused of improper spending is compelled to answer for and justify the spending in the public arena. In a criminal court of law, he need not. Rather, it is the burden of the State to prove that a specific form of spending was improper and/or solely in furtherance of a private interest such that it could have no other reasonable explanation. Further complicating this task is the Fifth Amendment right against self-incrimination. This is especially true in cases where the one person responsible and presumably apprised of the thousands of expenses paid over the course of many years is under suspicion and asserts that right, as Miller did in this case.

We recognize the special danger and insidious nature of crimes committed by public officials. Not only does public corruption fundamentally threaten core principles of a democratic system, it diminishes the quality of government service, fosters a lack of respect for our shared institutions, limits private investment and economic growth, and wastes taxpayers' hard-earned money. Prosecuting cases of public corruption is one of our top priorities. However, the heightened public injury that results from public corruption does not allow a State's Attorney to dilute his standards when making charging decisions any more than he can moderate his approach when charging a murder as opposed to a petty theft.

The FBI also investigated the Algonquin Township Road District's credit card use and spending on the Amazon website. Upon presenting its findings to the United States Attorney's Office, charges were declined. After conducting this investigation, we tendered the prosecution to the Illinois Attorney General's Office. We felt it was important that another agency review our investigation and determine independently whether it was appropriate to charge under State law and, if so, assume the prosecution. Important in the sense that members of our Office variously serving as prosecuting attorneys and appearing as witnesses may create the appearance of a conflict of interest. After its nearly three-month review, the Illinois Attorney General's Office, acting as special prosecutor, declined charges. Despite this and the difficult position of serving as both investigator and prosecutor, we still arguably retain authority to prosecute should we choose.

We also decline to prosecute Miller at this time for the reasons discussed herein. New allegations, however, seem to be surfacing regularly. Our investigation into these new matters will continue. That said, we believe now, as we did when we voluntarily undertook this investigation that an explanation to the public is owed. The foregoing is an attempt to provide that explanation on our work

to date. It is important to note that our decision not to prosecute is not a declaration of Miller's innocence or any assessment of his aptitude as Highway Commissioner or virtue while serving in that role. Rather, we determined, mostly, that there is insufficient evidence to establish beyond a reasonable doubt that Miller committed a criminal offense.

Should any member of the public wish to discuss this matter further, please contact me at (815) 334-4159.

A handwritten signature in cursive script that reads "Pat Kenneally". The signature is written in black ink and is positioned above the printed name.

Patrick Kenneally  
McHenry County State's Attorney

**I. Allegation: Miller improperly spent Road District money for private purposes.**

**A. Summary of the Facts**

In the Fall of 2017 after various allegations surfaced that Miller misused the Road District's credit card and otherwise misspent Road District money, we contacted the FBI. The FBI agreed to review Road District spending between 2012 and 2017. In April of 2018, the FBI informed us that it had completed its analysis and did not believe that Miller's questionable spending constituted a criminal offense. Pursuant to a court order, the FBI shared its analysis with the Illinois Attorney General.

Thereafter, we similarly reviewed all Road District spending between 2012 and 2017. Our investigator itemized all questionable spending for those years in her reports. Some examples of significant or pronounced forms of questionable spending worthy of further discussion include:

**1. Restaurants**

- \$582.43 at Chris's Coach House (Cary), December 2012. The total bill was \$1,749.29. It was divided three ways, with the Road District, Supervisor's Office, and Assessors Office each paying \$582.43, respectively. The bill was submitted in January, but the timing of the charge would suggest that the costs were incurred as part of a holiday event.
- \$337.66 at Cheseapeake Seafood House (Springfield), November 9, 2015
- \$141.66 at Jameson's Charhouse (Crystal Lake), November 17, 2015

**2. Recurring Annual Charges at the Brunch Cafe and Hooters**

- \$176.38 at Brunch Cafe and \$324.89 at Hooters in Wisconsin, February, 2012
- \$183.07 at Brunch Café and \$272.27 at Hooters, January, 2014
- \$116.14 at Brunch Café and \$202.65 at Hooters, May, 2015
- \$188.14 at Brunch Café and \$288.62 at Hooters, January, 2016

**3. Recurring Charges for Women's Clothing**

- \$164.64 at J. Jill Catalog, February, 2012
- \$110.77 at Lands End, February 2013
- \$249.62 at Lands End, May 2013
- \$348.23 at Land's End, October, 2014
- \$190.19 at Prana Living, November, 2016

4. Recurring Charges for Levenger Bags

- \$111.57 at Levenger, “I-Pad Carry Case,” January, 2013
- \$211.44 at Levenger, “Brown Brief Bag,” July, 2014
- \$384.52 at Levenger, “grape/black” bag, November, 2014
- \$263.55 at Levenger, bag, June, 2016

5. Restaurant Charges For Election Events

- \$550 at Kojak’s Restaurant (Cary), May, 2012 (the total bill was \$1,100 and was divided between the Road District and Township)
- \$550 at Brunch Cafe, February, 2013 (the total bill was \$1,100 and was divided between the Road District and Township)
- \$550 at Brunch Cafe, December, 2014 (note with bill says for election judges) (the total bill was \$1,100, it was divided between the Road District and Township).
- \$500 at Domino’s Pizza, March, 2014 (the total bill was \$1,000 and was divided between the Road District and Township)
- \$500 at Brunch Café, April, 2015 (the total bill was \$1,000 and was divided between the Road District and Township)
- \$550 at Bruch Café, March 18, 2016 (the total bill was \$1,100 and was divided between the Road District and Township)

6. Charges That Were Repaid

- \$625.43 at Rushing Waters Fishery, March, 2012 (this purchase was made on the Road District credit card and submitted with the request for payment was a check from the McHenry County Highway Commissioners for the full amount)
- \$628.60 to Yankee Candle Company, November, 2012 (along with this charge on the Road District credit card, there is a note indicating the purchase was for holiday gifts and a breakdown showing \$572.62 to be paid by the McHenry County Highway Commissioners and \$55.98 to Anna May Miller along with two checks for the same)
- \$94.47 credit card NAPA Auto Parts, January 2014 (submitted with personal check for the entire amount by Road District employee Kunz)
- \$625.43 at Linen Source, November, 2015 (this purchase was made on the Road District credit card and submitted with the request for payment was a check from the McHenry County Highway Commissioners for the full amount)
- \$682.43 at Rushing Waters Fishery, April, 2016 (this purchase was made on the Road District credit card and submitted with the request for payment was a check from the McHenry County Highway Commissioners for the full amount)
- \$870.00 at Orchard Meats Deli and Wine, July, 2016 for “Township Steak Fry” (this purchase was made on the Road District credit card)

and submitted with the request for payment was a check from the McHenry County Highway Commissioners for the full amount)

7. Amazon Purchases From Amazon Bookstore

- \$1,299 to Amazon, August, 2014
- \$117 to Amazon, December, 2014, \$256.49 on December 12, 2014
- \$167.24 to Amazon, December, 2016

8. Other

- \$182.00 to Disneyland, June, 2012
- \$256.90 for and \$199.95 for a Kodak Digital Frame, January, 2013
- \$37.47 to Sam's Club, February, 2013 (for weatherproof cornhole bags)
- \$93.74 to Edible Arrangements, December, 2013 (this was a credit card purchase, get-well gift for Diane Klemm along with get-well card that was signed by the entire Township Board)
- \$9.88 and \$7.97 at Menards, June, 2015 (this was for a BBQ Tool Set and long handled BBQ brush, respectively)
- \$299 to Blink for Home, January, 2016 (security system that allows remote monitoring from phone)
- \$210.90 in Gift Cards from Jewel, June, 2016
- \$498.98 to Galati's Hideaway (pizza retirement party), April, 2017
- \$206.25 to Dazell & Co. (retirement watch), April, 2017

B. Relevant Law

60 ILCS 1/80-10(a)

The township board shall meet at the township clerk's office for the purpose of examining and auditing the township and road district accounts before any bills...are paid.

60 ILCS 1/80-15

The township board shall, at the same time and place as stated in Section 80-10, examine the accounts of...the commissioner of highways of the township for all moneys received and distributed by them. The board shall also examine and audit (i) all charges and claims against their township and against their road district and (ii) the compensation of all township officers.

605 ILCS 5/6-201.6

[The Highway Commissioner shall] [d]irect the expenditures of all moneys collected in the district for road purposes, including those purposes allowed under Section 6-201.21 of the this Code, and draw warrants on the district treasurer therefor, provided such warrants are countersigned by the district clerk.

605 5/6-201.15

The Township Road Commissioner shall annually make a report in writing, showing the following:

- 1) The amount of road money received by the district and a full and detailed statement as to how and where expended and the balance, if any, unexpended...

In counties under township organization, the reports in districts composed of a single township shall be made to the board of town trustees within 30 days before the annual town meeting...

605 ILCS 5/6-205

The [Township Supervisor] shall receive and have charge of all moneys raised in the district for the support and maintenance of roads therein....He shall hold such moneys at all times subject to the order of the highway commissioner and shall pay them over upon the order of the commissioner.... In counties under township organization such moneys, other than Social Security taxes required by the Social Security Enabling Act, shall not be paid over until the board of trustees...has examined and audited the claims or charges for which such order is drawn.

Article VIII, § 1(a) & (b) of the Illinois Constitution

Section (a) provides that “property or credit shall be used only for public purposes.” Section (b) provides that [t]he State, units of local government and school districts shall incur obligations for payment or make payments from public funds only as authorized by law or ordinance.”

Unfortunately, there are only a few cases that are helpful in determining what types and categories of expenditures have a “public purpose.” The most illuminating is *People ex rel. McDavid v. Barrett*, 370 Ill. 478 (1939), decided by the Illinois Supreme Court. *Barrett* involved the constitutionality of a statute that paid the widows of deceased judges in an amount equal to the judge’s salary from the date of his death to the time of the qualification of his successor. The law was challenged on the grounds that the statute was an unconstitutional attempt to provide gratuities from public funds for the exclusive benefit of private persons.

The Illinois Supreme Court began its analysis by stating, whether government spending is for a public or private purpose is a question “not always easy of determination.” It continued:

In deciding whether such purpose is public or private, courts must be largely influenced by the course and usage of the government, the object for which the [spending] has been customarily and by long course of legislation levied and made, and what objects have been considered necessary to the support and of the proper use of the government. Whatever lawfully pertains to this purpose and is sanctioned by time and the acquiescence of the people may well be

said to be a public purpose and proper for the maintenance of good government...Limitations resting on theory, only, or on the vague ground of doubt, but which the people have been satisfied to leave to the judgment, patriotism and sense of justice of their representatives, are not within the control of the courts. The power of the State to expend public moneys for public purposes is not to be limited, alone, to the narrow lines of necessity, but the principles of wise statesmanship demand that those things which subserve the general well-being of society and the happiness and prosperity of the people shall meet the consideration of the legislative body of the State...If it can be seen that the purpose sought to be obtained is a public one and contains the elements of public benefit, the question of how much benefit is thereby derived by the public is one for the legislature and not the courts.

There are two important insights that are to be drawn from this excerpt. First, the courts will give broad discretion to the legislature and the officials it tasks with expending public funds. Courts will not generally substitute its judgment on the question of whether the spending is for a “public purpose.” This is especially true if that spending has been established over time as customary and one could reasonably view (i.e. “it could be seen”) that the spending resulted in some, even slight public benefit. Second, it is not enough to maintain that the spending was not “necessary” to accomplish the intended public purpose or even that it is doubtful that the spending was for a public purpose. Rather, public officials authorized by the legislature to expend money appear to receive the benefit of the doubt.

The Illinois Supreme Court in *Barrett* also discussed awards or gratuities given to public employees. It stated:

We held that representative government finds its greatest security in a strong spirit of patriotism and love of country; and that whatever tends to the greater patriotism and a greater interest in government makes for the welfare of the State. We pointed out that the erection of monuments and the awarding of swords and medals have always been recognized as means of rewarding meritorious service, and the legislature might use public funds for such purposes...[I]t holds that the power to give rewards after the event of conspicuous public service cannot be limited to military service; that if a man has deserved greatly of the commonwealth by civil services, the public advantage of recognizing his merit stands on grounds as strong as that for rewarding a General; that the possibilities of genius or distinguished worth cannot be foreseen so as to be settled for in advance, and the public welfare, alone, is only legal justification for such payment; and that whether the public good will be served, must be left largely to the conscience of the legislature.

While public officials are afforded broad discretion, it is not limitless. In *Village of Oak Law v. Faber*, 378 Ill. App 3d 458 (1<sup>st</sup> Dist. 2007), the appellate court

ruled that supplemental payments to a government employee untethered to an actual service contravened Article VIII, §1. The court stated:

[c]ompensation and benefits of public employees must comply with the constitutional requirement that public funds and property be used only for public purposes. Thus it has been held that payment or allowance in excess of that which was fixed by law or contract at the time when services were rendered, and when no further services are contemplated, is a gift for the private benefit of the individual, which serves no public purpose...

Moreover, there are also a number of cases that were decided prior to the ratification of the 1970 Constitution holding that supplemental pay in the form of an increased pension or supplemental payment to retired public servants was unconstitutional. Many of these cases were decided, however, on the basis of Art 4 § 19 of the 1870 Constitution, which prohibited the granting of any extra compensation to any public officer, agent, servant, or contractor after service has been rendered or a contract made. This section, importantly, was repealed when the 1970 Constitution was ratified.

#### Official Misconduct, 720 ILCS 5/33-3

(a) A public officer or employee or special government agent commits misconduct when, in his official capacity or capacity as a special government agent, he or she commits any of the following acts:

- (1) Intentionally or recklessly fails to perform any mandatory duty as required by law; or
- (2) Knowingly performs an act which he knows he is forbidden by law to perform; or
- (3) With intent to obtain a personal advantage for himself or another, he performs an act in excess of his lawful authority; or
- (4) Solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law...

(c) A public officer or employee or special government agent convicted of violating any provision of this Section forfeits his or her office or employment or position as a special government agent. In addition, he or she commits a Class 3 felony.

#### Theft, 720 ILCS 5/16-1

(a) A person commits theft when he or she knowingly:

- (1) Obtains or exerts unauthorized control over property of the owner; or
- (2) Obtains by deception control over property of the owner; or
- (3) Obtains by threat control over property of the owner; or
- (4) Obtains control over stolen property knowing the property to have been stolen or under such circumstances as would reasonably induce him or her to believe that the property was stolen; or
- (5) Obtains or exerts control over property in the custody of any law enforcement agency which any law enforcement officer or any individual

acting in behalf of a law enforcement agency explicitly represents to the person as being stolen or represents to the person such circumstances as would reasonably induce the person to believe that the property was stolen, and

- (A) Intends to deprive the owner permanently of the use or benefit of the property; or
- (B) Knowingly uses, conceals or abandons the property in such manner as to deprive the owner permanently of such use or benefit; or
- (C) Uses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner permanently of such use or benefit.

In *People v. Sturgeon*, the defendant, a comptroller for a local water commission, was found guilty of theft after using the commission's debit card for personal spending. 2016 IL App (4<sup>th</sup>) 140736-U. The personal spending included hotel parking while on a personal vacation, trips to the grocery store and hardware store, and Dish network service at the defendant's personal address. As comptroller, the defendant was responsible for paying the bills. The commissioners only approved "large bills." The commissioners testified that while there were no formal spending policies, members were "aware" of general practices of spending only for business related purposes. Upon being confronted by the commissioners, the defendant offered to repay the money, claimed he was broke and needed extra money, and that he deserved "extra stuff" for his work.

In finding that the lack of explicit policies was an insufficient grounds upon which to reverse the defendant's conviction, the appellate court noted that there was a general understanding of authorized purchases and it would be unreasonable for the defendant to make the assumption that he could spend money on personal items or unilaterally reimburse himself. The court further rejected the defendant's arguments that some of the purchases, such as at the hardware store, were legitimate. In dismissing this contention, the court noted that no one at the commission had authorized the defendant to unilaterally make spending decisions. The court noted further that the defendant's response in offering to repay the money when confronted by commissioners evidences his own understanding of the improper nature of the charges.

#### Misapplication of funds, 720 ILCS 5/33E-16

(a) An officer, director, agent, or employee of, or affiliated in any capacity with any unit of local government or school district commits misapplication of funds when he or she knowingly misapplies any of the moneys, funds, or credits of the unit of local government or school district.

(b) Sentence. Misapplication of funds is a Class 3 felony.

### C. Discussion

The question of whether or not Miller should be charged with a criminal offense - “that he acted in excess of his lawful authority under the Illinois Constitution or Highway Code (official misconduct), “obtain[ed] or exert[ed] unauthorized control” over property (theft), or “misapplie[d] any public moneys” (misapplication of funds) - rests upon a narrower question: whether the spending can be deemed to be for a “public use.” In the case of a Highway Commissioner, bestowed only with the authority to “direct the expenditures of all moneys collected in the district for road purposes,” the question can be narrowed still further to whether spending was for “road purposes.” As stated by the former and current Township Supervisors, both elected by Township residents, as long as Miller had money in his budget, generally the Road and Bridge Fund, he had expansive discretion on how that money should be spent. This discretion was circumscribed only by the power of the Township Board to examine and audit the Road District’s spending before payment.

As stated by Trustees Sanchez and Emery, the Township Board had the opportunity to review all Township bills, credit card purchases, and other expenditures and had regular occasion to question Miller regarding said spending. Trustee Fischer, in particular, stated that the Trustees would review the spending “in detail.” Township attorney Jim Kelly stated that all Road District bills and expenses were turned in the week before any Board meeting. He indicated further that all Road District bills and expenses were and currently are available at the Township for inspection by the public.

After review and on every occasion, the Trustees approved all of the above-cited questionable spending.

What constitutes a “road purpose” is not a simple question. Certainly there are the more literal among us who believe that a government workplace should be as spartan as possible and would say that a “road purpose” is spending that results in material or a service being directly applied to an actual road – e.g. salting, plowing, and filling pot holes. This, however, sets the core and not the parameters. Most should have no difficulty recognizing that there are types of spending not directly tied to a physical road nor expressly authorized by statute that are legitimate. In the case of the Road District, these would include attendance at trainings or trade expositions that allow employees to become better informed as to the nature of their work, internet access, phone service, certain types of work clothes and equipment, and office supplies. One instinctively recognizes that, while not directly related to a physical road, these are supporting expenses that are a necessary corollary to road care.

As the necessity or the relation of the expense becomes more remote from the physical care of roads, whether the spending is for a “road purpose” becomes more obscure. In the first two months after Miller’s tenure, the current Highway Commissioner spent taxpayer money, with Board approval, on such things as cable television, a bouncy house, a balloon sculptor, and baseball hats. Perhaps tellingly, no one is clamoring for the State’s Attorney’s Office to investigate these forms of spending for purposes of establishing a criminal charge.

To be sure, however, one could legitimately question the degree to which any of these expenses furthers a public purpose. On the other hand, one could certainly make a case that they do. For example, the bouncy house at special events (like the cornhole bags and barbeque equipment) serves to attract young families to the Road District where, to further public relations and an understanding of Road District work, they are allowed to inspect the grounds and equipment and interact with employees.

One could similarly maintain that these forms of spending do not further a road purpose or are beyond the ken of the express powers assigned to the Highway Commissioner by statute. On the hand, the Highway Commissioner possesses not only those powers expressly granted, but also those powers “necessary or fairly implied in, or incident to, the powers expressly granted.” For example, “incident to” a highway commissioner’s express authority to oversee a public body and “employ labor” is his authority to purchase hats on behalf of those employees so they may be readily identified when in public, to foster a team spirit and cooperation among employees, etcetera.

The aforementioned expenditures during Miller’s tenure, while perhaps controversial, are of a different nature than those that have been previously found to sustain criminal charges. In *People v. Howard*, 228 Ill. 2d 428 (2008), a mayor was convicted of official misconduct after obtaining cash advances to play video poker. In *People v. Mehelic*, a highway commissioner was found guilty of official misconduct and theft after ordering a township employee to work on his personal car during work hours. 152 Ill. App. 3d 843 (5<sup>th</sup> Dist 1987). Moreover, this case is readily distinguishable from *Sturgeon*. Unlike *Sturgeon*, Miller’s purchases were all reviewed and approved by the Township Board. There is no evidence that Miller attempted to conceal or misrepresent any Road District expenditure. Moreover, unlike the purchases in *Sturgeon*, such as hotel parking while on a personal vacation and cable at the defendant’s residence, all of the questionable purchases bore at least some relation to Township activities.

When evaluating the aforementioned expenditures, it is also important to be considerate of the context in which they were made. As described by Charles Lutzow, current Township Supervisor and former Township Clerk, and over the last 20 years, no one at the Township had seen fit to formalize any system of internal

controls for spending. Rather, he stated that “everyone just did [what] they thought was correct.” Lutzow describes how years ago it was common practice for all Township employees to bring their wives on trips to out-of-state conferences at the expense of the Township. While operating in an institutional culture that is, at best, inattentive does not excuse individual acts of wrongdoing, long-standing practices evidenced by bills that are subject to review at any time by the public and their representatives are not irrelevant to the question here. As stated by the Supreme Court, “in deciding whether such purpose is public or private, courts must be largely influenced by the course and usage of the government, the object for which the [spending] has been customarily and by long course of legislation levied and made, and what objects have been considered necessary to the support and of the proper use of the government.”

The State’s Attorney’s Office does not consider itself to be in a better position than the elected officials entrusted by the legislature and Algonquin Township constituents to oversee and safeguard spending at the Road District and ensure all spending is for a “road purpose.” As stated by the Supreme Court, “if it can be seen that the purpose sought to be contained is a public one and contains the elements of public benefit, the question of how much benefit that is thereby derived by the public is one for the legislature and not the courts.” *Barrett*, 370 Ill. 478 at 483. As such, we will generally defer to Miller and the Trustees that reviewed and unanimously approved these expenditures unless there is no credible basis upon which to view the expenditure as being for a “road purpose” as opposed to private interests.

We believe that modest and infrequent expenditures for such things as holiday dinners, gift cards, breakfast or lunch for the staff before an annual trade show, holiday gifts, gatherings for staff, and “get well” bestowals have “elements of a public purpose.” As stated by Lutzow, retention and satisfaction of experienced and competent employees are “very important matters that were directly related to road district operations and would be deemed a legitimate use of township funds.” We are aware of an enormous body of learning and research indicating that employee recognition, often in the form of tokens of appreciation or meals, is vital to creating a functional work environment, increasing productivity, and building teamwork. We are aware further of a number of other local governmental organizations that also expend *de minimis* amounts in their budget in similar ways.

With respect to the breakfasts and lunches before and after trade shows, specifically, a number of employees indicated that these meals had elements of a business meeting in that they would discuss Road District business and the trade show. Moreover, we are aware of a number of governmental organizations that regularly reimburse employees for travel expenditures, especially meals.

Specifically with respect to the gift cards, Lutzow stated that these were provided to members of the public whose mail boxes were destroyed or damaged accidentally by Road District workers during the process of maintaining roads. We find these small gestures in an attempt to maintain community relations and provide some recompense to the members of the public who had to bear the inconvenience of damaged property sufficiently related to a public purpose.

We also find elements of a public purpose in expenditures for clothing and carry bags. As to the clothes, Anna May Miller was responsible for being present at the Township and addressing the needs and concerns of constituents. It is certainly important for those dealing with the public to present in an orderly and professional manner. We are aware of other government agencies that provide clothing allowances for office work attire to employees. As all of the attire purchased by the Road District would appear to be appropriate in an office setting (e.g. there were no biking spandex or bathing suits purchased), the mere expense of women's clothes is insufficient to establish criminality beyond a reasonable doubt. Moreover, Township Clerk Lukasik indicated that some of the clothes purchased by Anna May Miller were rugged in nature and worn during recycling and shredding events that involved "getting dirty." Though true that the clothing allowance policy does not cover women's clothing, there is no law stating that Miller is required to follow the administrative policies he sets or cannot, on occasion and in his best judgment, deviate from those policies.

As for the bags, we believe that Trustee Fischer provides an adequate explanation. According to Fischer, Miller was questioned on the bag purchases on at least one occasion and satisfactorily explained that the bags were for the purpose of transporting Township documents to and from business meetings. As verified, the grape/black Levenger bag purchased in 2016 is currently in the possession Lukasik.

With respect to the Disneyland tickets, this expenditure also bore elements of legitimacy. We learned that at the time the tickets were purchased, there was an American Public Works Association conference being held in Anaheim, California. We learned further that, as part of the conference, there was a training and networking event held at Disneyland that necessitated the purchase of the tickets at a reduced rate.

With respect to the few personal charges for such things as a car battery and holiday gifts that were credited to the Township credit card and subsequently paid with personal funds, we see little here that warrants felony prosecution. While it is likely true that Miller had no statutory authority to charge these items, which were unrelated to a "road purpose", he did have the explicit approval of former Township Supervisor Diane Klemm and the evident approval of Trustees. Moreover, in order to constitute official misconduct, the act in "excess of lawful authority" must have

resulted in a “personal advantage.” In view of the facts that the Road District was repaid in full, any personal advantage that may have been derived is somewhere between slight and non-existent.

In *Howard*, there was evidence that the defendant paid back the cash advances he received for video poker. Under the official misconduct statute, the court ruled that the repayments did not immunize the defendant from “official misconduct” because he acted in excess of lawful authority and “personally benefitted” in that he obtained an “interest-free” loan. In so holding though, the court made an interesting finding. Specifically, the court stated that it “was not unsympathetic” to the defendant’s argument that the “official misconduct” statute as applied to situations like this where there was minimal actual harm could result in “overzealous prosecution of undeserving defendants.”

The nature of the questionable spending here is distinct. Miller used his credit card to buy Christmas gifts for staff and Township employees, whereas the defendant in *Howard* used cash advances to play video poker after his personal funds were depleted. Moreover, unlike *Howard*, the Trustees approved this form of spending; Diane Klemm explicitly stated that Miller had authority to use the credit card in this manner. The harms suffered by the Township or taxpayers in unwittingly providing an “interest-free” loan to the Road District for a month or less amounts to, at most, a few cents. Even if this spending could be said to constitute official misconduct or misapplication of funds, we believe a felony charge here would be overwrought and constitute an overzealous prosecution beyond any public interest.

With respect to meals after special events like “Recycling Day” and “Touch a Truck” (noted in investigative reports), we likewise see elements of a public purpose. These meals were provided to employees working on weekends, served on the Township premises, and enabled overtime work.

With respect to the Blink Camera, both Lutzow and IT consultant, Keith Seda, verified that Miller had this camera in his Office and used it for security purposes.

With respect to the Kodak digital frame, we learned that these were used at trade shows and business expos to display pictures of Road District operations and equipment.

With respect to the Amazon Bookstore purchases, we learned that these were for SD cards and electric cables, not books. These electric cables and SD cards were used in conjunction with advanced electronic equipment built into trucks.

With respect to the retirement party and gift in April of 2017, while seemingly excessive, this spending to recognize the perceived meritorious service of an employee has been seen by the supreme court as having a public purpose.

With respect to the credit card points, the FBI and the Illinois Attorney General's Office, who received the FBI's Amazon and credit card subpoenas, investigated this matter. So as not to duplicate efforts, we did not conduct a parallel investigation. Both the FBI and Attorney General's Office informed us that they were unable to develop evidence regarding any alleged misuse of credit card points sufficient to establish grounds for a criminal prosecution. That said, we are currently in the process of verifying these findings.

With respect to the Election Judges meals, we learned that the Algonquin Township served as a meeting place for all 68 of the precincts located in Algonquin. After the elections, the judges would drop off all of the election equipment at the Township and Township employees loaded the items onto a truck to transport it back to the County (financial records indicate that the Township was reimbursed for manpower hours by the County Clerk). According to Lutzow, the Township and Road District would split the cost of feeding the election judges, who had worked a 15-hour day, dropping off the equipment. According to Lutzow, feeding election judges was a longstanding practice.

We do have serious doubts that expenditures for election meals, especially during elections not involving townships, served any public or road purpose. Though perhaps a considerate gesture on behalf of election judges that may have an attenuated relationship to public relations, such spending is wholly inconsiderate of taxpayers. Townships must be mindful of the fact that they are not charitable organizations. However and again, we are reminded of the guidance provided by the Illinois Supreme Court that objections to spending based on "the vague ground of doubt" or on the grounds that it only provides a limited public benefit are not questions for the court.

We find no evidence that Miller was enriched by providing food to election judges or sought to further some personal interest in doing so. Moreover, even if we were to conclude that the spending had no credible public purpose, we face the thorny question of who to indict? Miller? The Trustees and Township Supervisor that sanctioned half of the spending from Township funds? We do not regard justice as being served by subjecting all of these people, who lack a sophisticated understanding of the vagaries of Article VIII, section 1 of the Illinois Constitution or Dillon's Rule, to the risk of a felony conviction. Nor do we believe doing so would be in the public interest. We note too that the Township's or Road District's interest here can be readily vindicated in civil court by suing to recover any spending deemed inappropriate.

Despite our efforts and short of a search warrant for Miller's residence that no judge would authorize due to staleness, we were unable to physically account for a number of items purchased with Township funds, such as the Blink Camera, some clothing purchases, carry bags, and few other items. While some believe that the ostensibly questionable nature of these purchases and the fact that these items currently cannot be accounted for is sufficient evidence upon which to charge Miller; it is not. There are a number of other reasonable explanations beyond Miller having stolen these items that cannot be eliminated. These include the possibilities that some other Township employee took unauthorized control over the property or that the items were damaged or reached the end of their useful life and were discarded.

Upon review of the credit card statements and other expenditures, there are a number of charges that cannot plainly be settled as for a "road purpose" just by considering the business credited. Our one investigator could spend a very long time subpoenaing every business that has accepted the Road District's credit card over the last several years for itemized receipts and any other documentation they may still retain and seek to identify and interview employees involved with any of the transactions with the Road District on the off chance they have some lingering recollection of an unremarkable business transaction from years prior. We decline to expend our limited resources in this manner. At this juncture, we are satisfied by the facts that the Trustees contemporaneously reviewed and approved all Road District spending over the course of many years and specific allegations of improper spending are either unsupported or do not amount to proof beyond a reasonable doubt.

As such, we are not moved by the "what about this?" form of rebuttal to our conclusions here. Our job has been to investigate the specific allegations that have been *brought to* the State's Attorney's Office, not investigate Miller "generally" or audit and verify every transaction. As stated, our investigation may or may not end here. If anyone has any specific information or evidence that a specific Road District expenditure not discussed here solely furthered a private interest, please contact our Office to schedule an interview.

It bears repeating that our analysis here is not an endorsement of the manner in which Road District resources were allocated. As taxpayers ourselves, we certainly consider many of the expenditures to be imprudent and the amount paid unworthy of the purported "public benefit." Miller is not solely to blame. We regard the Township's lack of a written, detailed, and binding spending policy and overall insouciance to the manner in which taxpayer money was consumed as a breach of its fiduciary duty to taxpayers.

However, Illinois law is grossly undeveloped and ambiguous with regard to the limits of public spending and we do not believe criminal court, which requires

proof beyond a reasonable doubt and where one's liberty is in jeopardy, is the appropriate venue in which to seek clarification. As such, we defer to the Illinois Supreme Court's admonition that "limitations [on public spending] resting on theory, only, or on the vague ground of doubt, but which the people have been satisfied to leave to the judgment, patriotism and sense of justice of their representatives, are not within the control of the courts." In Illinois, the legislature has seen fit to impart expansive authority upon highway commissioners to direct "the expenditure of all moneys" subject only to review by trustees and only after being elected to do so by constituents. As nearly all of the spending reviewed here can be deemed as having the elements of a public benefit, however nominally, whether said spending was patriotic, just, or show good judgment is a question best left to voters, not the courts. Indeed, voters appear to have already spoken on the issue.

## **II. Allegation: Miller was illegally paying employees in the form of "Miscellaneous Pay."**

### **A. Summary of the Facts**

Between January of 2013 and May of 2017, the Road District paid employees in the form of "miscellaneous pay" in the following amounts:

- A.M. Miller, \$29,290
- B. Doubek, \$19,4500
- D. Helman, \$26,212.50
- D. Lee, \$30,335
- R. Voss, \$22,800
- A. Rosecrans, \$25,135
- D. Stern, \$23,600
- D. Turskey (bus driver), \$1,400
- D. Wacyk (bus driver), \$1,400
- R. Greene, \$18,050
- N. Chrikos (bus driver), \$550
- A. Sylvester (bus driver), \$550
- K. Fitzgerald, \$7,150
- D. Morrison, \$6,353.13
- M. Barnas, \$8,750
- C. Mohr, \$1,200
- R. Mohr (bus driver), \$1,050
- K. Lukasik (bus driver), \$250

This miscellaneous pay was provided to employees as salary in addition to their regular hourly and overtime pay.

During interviews, Township employees justified "miscellaneous pay" in a number of ways. Many employees explained the approximately \$200 payments allocated monthly between April and November as compensation for four hours of weekend work at Township recycling events. Employees also described receiving "miscellaneous pay" for working at other special Township events, such as "Touch a Truck," usually held during summer months. Pay varied depending on the number of hours worked and whether employees were involved in "set up" and "clean up."

Road worker employees, who were responsible for maintaining the roads, also described receiving \$100 weekly for being “on call.” Each month, one or two employees were designated as being “on call” to address all off-hour emergencies other than snow removal. In addition, road workers, who were also responsible for operating or servicing the snowplows during winter months, indicated that they received “shift differential pay” as “miscellaneous pay.” Shift differential pay is extra pay for having to be on-call if weather during the winter months required a “call out” for road work.

We learned during the course of our investigation that employees Lee and Barnas received “foreman’s pay” once a year in the amount of approximately \$1,700. This was to compensate them for their managerial and supervisory duties.

Sylvester, a bus driver, described the \$550 he received in “miscellaneous pay” in December of 2015 and 2016 as a “holiday bonus.” Sylvester identified “general knowledge around the road district” as his basis for believing the money he received was a bonus. He indicated further that he never had a conversation with Miller about the extra money, as he did not want to ask questions. Helman and Tursky also described the pay received in November and December as a bonus.

Lukasik similarly indicated that the “miscellaneous pay” she received was “above and beyond” pay for exceptional work on behalf of the Road District.

Mohr indicated that “miscellaneous pay,” especially around the holiday, was a creative way Miller allocated the budget to provide increased pay to employees without giving raises or cost of living increases. This was done, according to Mohr, in an effort to keep the tax levy flat.

Most of the employees interviewed, upon reviewing the few “miscellaneous pay” awards not associated with “winter shift differential” pay or a special event were often uncertain as to what work they had done to validate the payments. They attributed this to the fact that receiving “miscellaneous pay” was an unremarkable part of employment and their inability to recall the reasons for payments issued years prior.

Helman also indicated that A. Miller, a regular recipient of miscellaneous pay, worked “very long hours” and he knew she had “additional responsibilities” beyond a 40-hour work week.

Klemm stated that she was aware of the “shift differential pay.” She stated that all the road workers and A. Miller were authorized to receive this pay. Specifically, A. Miller was entitled to receive “winter shift differential” pay because she would also have to be on-call to take care of internal matters during winter

month “call outs.” Klemm stated that A. Miller’s “shift differential” pay was approved by the Township Board. Klemm stated further that she was aware that bus drivers received additional pay around the holidays. Klemm stated that Miller had the authority to spend the money in his budget as he saw fit.

Lutzow described “miscellaneous pay” as just how they coded “stipend” pay in the system. Lutzow stated further that he believed that Miller was allowed to spend the money in his budget as he saw fit, which included giving stipends to employees. Lutzow also stated that A. Miller worked very long hours, describing the Road District as her life. He stated further that if her husband was called out for weather during winter periods, A. Miller went too. Lutzow opined that stipend pay served the public purpose of adequately compensating and retaining productive employees. He felt “miscellaneous pay” was a legitimate use of Township funds.

Trustees Emery and Fischer, who both served from 2013 through 2017, stated that Miller had the authority to give bonuses or stipends instead of raises as long as he was working within his approved budget. Fischer stated that she believed it was within Miller’s authority to provide miscellaneous payments. All “miscellaneous pay” distributed by Miller between 2012 and 2017 was approved by the Township Board.

As of February of 2018, the current Highway Commissioner had continued the practice of providing “on call” pay and “shift differential pay” in the form of “miscellaneous pay.” In particular, road workers received “miscellaneous pay” in the amount of \$100 per week for being “on call” generally and \$350 per month from November through March.

During the course of our investigation, we learned that all employees, including A. Miller, were hourly, non-exempt employees. All employees indicated that they did not have a written employment contract and that their “regular rate,” i.e. hourly-rate for 40-hours, was set by oral agreement. The employees indicated further that they would receive an hourly rate of time-and-a-half for overtime work or a flat “miscellaneous pay” rate for certain types of overtime work at special events. Many indicated that they did not receive a raise or cost-of-living increase between 2012 and 2017. All “miscellaneous pay” was included for accounting purposes as “salary” and subject to taxation.

Upon review of a spreadsheet of all miscellaneous pay disbursed between 2012 and 2017, certain patterns emerge. First, between the months of April and November, a number of employees received a one-time payment of around \$200 on the same day; variously, some employees receiving more or less. We learned during the course of our investigation that the \$200 per employee amount was meant to compensate all employees equally as they were doing the same amount and type of work. The \$200 figure is an approximation of the overtime rate for the highest paid

road worker for four hours of work. In addition, during the summer “miscellaneous payments” for a number of employees coincided with document shredding, Touch-a-Truck, and other special events.

Upon further review, in the months of November and December, all road workers and A. Miller received between one and four payments amounting to approximately \$3,000. This is consistent with “winter shift differential pay.” Additionally, in December, the bus drivers received a one or two time payment in the amount of \$500 or less.

Upon further review, there were monthly payments of \$200 interspersed between one or two employees each month. This is consistent with the non-weather related “on call” pay.

Relevant provisions of the employee manual, effective 2012 and still effect as of April of 2018, are as follows:

#### INTRODUCTION

...The Handbook is presented to provide you with general guidance about the Road District’s current rules and procedures as well as the benefits currently offered to eligible employees. This Handbook is not an exhaustive list of every workplace rule and policy, but rather a guide to employees on commonly raised questions. Other policies may exist that are not included in this Employee Handbook.

While the Road District believes wholeheartedly in plans, policies, and procedures described in this Handbook, they are not conditions of employment and are subject to unilateral change by the Road District, which may reinterpret, change, supplement, or rescind any part of this Handbook or any of its other policies from time to time as it deems appropriate, with or without notice.

It is important that you understand that you are employee “at will,” which means that either you or the Road District may end your employment at any time, for any reason, with or without notice, and with or without cause. This Handbook is not to be construed as a contract for employment.

#### HOURS OF WORK

##### SCHEDULED WORK HOURS

The Highway Commissioner will set the work hours of each employee. The Highway Commissioner may stagger, rearrange, and adjust the hours of employment of his employees in such a manner as to enable him to provide all required services.

##### HOURS OF WORK COMPENSABLE AT STRAIGHT TIME

Road district employees will be compensated according to the salary schedule at the approved rate of pay for all work up to 40 hours in a work week.

##### HOURS OF WORK COMPENSABLE AT OVERTIME

##### PREMIUM

Compensation of overtime hours worked will be made in accordance with the Fair Labor Standards Act. In the event employees are

required to work hours in excess of 40 hours in a week, overtime will be paid under the following conditions:

- A. Overtime pay will be provided to those employees designated to receive overtime at a rate of 1.5 times their regular hourly rate of pay...

**WAITING TIME AS HOURS OF WORK**

Certain Road District positions require waiting time before performance of work. In computing hours worked, waiting time is to be considered under the following conditions:

- A. On DUTY: Waiting time under direction of an employee's supervisor during a scheduled work day shall be considered hours of work.
- B. OFF DUTY: Waiting more than one-half (1/2) hour before or after a scheduled work day which the employee may use as his own time off is not to be counted as hours worked.

**DRESS CODE**

...The Road District reserves the right to establish a dress code for all employees that have direct contract with customers or suppliers of the Road District. All employees are expected to follow all prescribed safety codes, such as the wearing of safety shoes, safety goggles when appropriate, etc.

There is nothing in the policy related to "miscellaneous pay," reimbursement of expenses, holiday bonuses, or compensation for special events (e.g. recycling).

**B. Relevant Law:**

60 ILCS 1/80-10(a)

*See section I.*

60 ILCS 1/80-15(a)

*See section I.*

605 ILCS 5/6-201.6

*See section I.*

605 5/6-201.15

*See section I.*

605 ILCS 5/6-201.20

Every highway commissioner with 5 or more employees in a county under township organization shall set and adopt rules concerning all benefits available to employees of that office. The rules shall include, without limitation, the following benefits to the extent they are applicable: insurance coverage, compensation, overtime pay, compensatory time off, holidays, vacations, sick leave, and maternity leave.

605 ILCS 5/6-205

See section I.

Article VIII, § 1(a) & (b) of the Illinois Constitution

See section I.

Fair Labor Standards Act, 29 U.S.C §207

(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees...for a work week longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed...

(e)(6) As used in this section the “regular rate” at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of the employee, but shall not be deemed to include...extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;...

There is no direct prohibition on bonuses for public employees in Illinois. Moreover, no Illinois case has interpreted the Constitution or the law as imposing such a ban. Our review of a number of other states reveals that bonuses for public employees are generally condoned. As stated by the Supreme Court of California:

With respect to a public employer's provision of benefits to its employees, including bonuses for work already performed, the cases have been fairly uniform in finding that such benefits serve public rather than private purposes. [Authorized bonuses] are ‘necessary to ensure the continued recruitment and retention of qualified and competent state employees.’

Official Misconduct, 720 ILCS 5/33-3

See section I.

In *People v. Williams*, the Illinois Supreme Court upheld the reversal of a conviction for official misconduct of a police dispatcher who informed the mother of her child and alleged drug dealer of police activity near his residence. 239 Ill. 2d 119 (2010). Her disclosure violated the police department’s rules and regulations regarding confidential information. The dispatcher was charged with official misconduct under section 33-3(a). The dispatcher was convicted at trial and the appellate court reversed. The supreme court ruled that the police department’s rules and regulations, though authorized to be established by ordinance of the village, are not “laws” for purposes of the official misconduct statute. Rather, a law cannot be construed as rules “promulgated solely by a person in authority of a governmental department,” but rather requires some type of “formal legislative process.”

Theft, 720 ILCS 5/16-1

See section I.

Misapplication of funds, 720 ILCS 5/33E-16

See section I.

### C. Discussion

From a legal standpoint, there is nothing criminal about providing “miscellaneous pay” to public officers. Pursuant to 605 ILCS 5/6-201.15, the highway commissioner has broad authority to “direct the expenditures of all moneys collected in the district for road purposes,” which would self-evidently include employee earnings. With few limitations, Miller was authorized to code and distribute employee compensation in whatever manner or form he chose, including “miscellaneous payments.” There is no law that required Miller to enter into written contracts with his employees setting forth the specifics, manner, and schedule of their remuneration. There is no law that prohibited Miller from paying employees for the services they provide only at “regular” and “overtime rates.” Rather, 29 U.S.C. 207(b)(e)(6) contemplates “premium” payments for work performed on off-days or weekends, so long as the amount is one and one-half times the rate established for “like work.”

Even if Miller was required to pay employees one and one-half times the regular rate for special events like “Touch a Truck and “Recycling Days,” it appears Miller complied with such a mandate in that he paid all employees the one and one-half times rate for the highest paid employee. Nothing prohibited Miller from paying employees more than time-and-a-half for overtime work. Our conclusions here were confirmed by the Illinois Department of Labor and labor attorney John Kelly.

We recognize that “miscellaneous pay” is not mentioned in or authorized by the “Algonquin Township Road District Personnel Policies and Procedures Handbook.” However, any breach of personnel policy is just that, a breach of the personnel policy and, as made clear by *Williams*, not Illinois law. Moreover, the personnel policy explicitly states that its contents are “not conditions of employment and are subject to unilateral change by the Road District, which may reinterpret, change, supplement, or rescind any part of this Handbook or any of its other policies from time to time as it deems appropriate, with or without notice.” Section 605 ILCS 5/6-201.20 provides that a highway commissioner “shall set and adopt” personnel policies, not that he is required to follow them. This is, no doubt, a poorly written piece of legislation, but clear nonetheless.

Even if “winter-shift differential pay” or December payments to bus drivers could be deemed a bonus, this is not necessarily a violation of Article VIII, section 1 of

the Illinois Constitution. We are aware that in 2016, Governor Rauner provided State employees with bonuses totaling over \$3 million. Moreover, we find elements of a public purpose in providing discretionary bonuses as one could reasonably maintain that they are “necessary to ensure the continued recruitment and retention of qualified and competent...employees.”

It is true that due to time and fallible memories, we have been unable to conclusively link a few of the hundreds of the “miscellaneous payments” made over the course of six years to a specific purpose or service provided the Road District. However, our investigation consistently revealed that by law and as applied, the disbursements in the form of “miscellaneous pay” do not rise to the level of a criminal offense.

Here again, we recognize that our conclusion is unsatisfying, especially when considering that employees Anna May Miller and Derek Lee amassed the most in “miscellaneous pay” over the course of six years by a few thousand dollars. We are sympathetic to the viewpoint that an elected official’s employment of his or her immediate family, especially in lucrative positions, is a serious breach of that official’s civic obligations. That said, Illinois voters have seen fit to endure a Highway Code that imposes few if any limits on the manner in which a highway commissioner compensates his employees. Algonquin voters saw fit to reelect Miller term after term despite the availability of public records documenting the questionable manner in which he exercised his spending authority. Short of criminal conduct, it is the voters that must defend the public’s interest in good laws and conscientious representatives.

### **III. Allegation: Miller Unlawfully Sold and Purchased Street Sweepers in 2017.**

#### **A. Summary of the Facts**

##### **i. Purchase of New Sweeper**

In 2012, the Road District purchased a new street sweeper for \$246,000. According to Road District employees, the machine immediately began having mechanical problems. These problems were exacerbated by a vehicle crash the sweeper suffered shortly after it was purchased. In 2015 and not satisfied with the 2012 street sweeper, the Road District began the process of looking to purchase a new street sweeper. As part of this process, the Road District agreed with Elgin Manufacturing to beta-test an Elgin Crosswind street sweeper for a year. During the beta-testing process, Township employees indicated that they were very satisfied with the Elgin machine, favoring this model, and Elgin products for their superior performance, parts availability, ease of maintaining and making repairs, and familiarity with the operating system.

In early 2017, the Road District released and published a solicitation for bids for a new street sweeper. Based on the recommendations of employees, the Road District used the Elgin model's specifications delivered to it by Standard Equipment in the invitation for bids. It should be noted that Standard Equipment is the only retailer in Midwest that sells Elgin Products. The Road District received three bids in response, one of which was from Standard Equipment for the Elgin Crosswind model. Standard Equipment was selected by the Road District despite the fact that its bid of \$307,719 was approximately \$40,000 higher than the next lowest bid.

Employees indicated that they believed that Standard Equipment was the lowest "responsible bidder" as the other bids did not conform to the specifications in significant ways and the Road District operators felt the Elgin hybrid model best suited their purposes. The bids were not revised after the initial invitation, and all bidders received the same information. We were unable to develop any evidence of collusion between Standard Equipment and the Road District.

It should be noted that Standard Equipment gave campaign contributions to Robert Miller's campaign on nine occasions from 2008 to the present totaling \$3,750. It appears that Standard Equipment donated 230 times to other campaigns over the same period.

ii. Sale of Old Sweeper

According to the Island Lake's Public Works director, Brian Bartnick, Island Lake became aware that the Road District was planning to purchase a new sweeper and contacted the Road District about the possibility of selling the 2012 sweeper. This was done approximately a year in advance of the actual sale. Miller permitted Island Lake to test the 2012 sweeper before the final purchase. In April of 2017, Island Lake purchased the 2012 sweeper from the Road District for \$70,000. Elector approval was not sought nor was any public notification of the sale made.

At the time of the sale, the 2012 sweeper had main engine hours of 2,612, sweeper chassis miles of 15,015, and engine hours of 1,263. As mentioned, the sweeper was involved in a crash on August 9, 2012 in which it was damaged. The sweeper sustained \$36,000 in repairable damage. The repairs appeared extensive and covered multiple body, frame, and mechanical damage areas.

B. Relevant Law:

605 ILCS 5/6-201.17

The Road Commissioner shall [h]ave authority to purchase or lease or to finance the purchase of highway construction and maintenance equipment under contracts

providing for payment in installments over a period of time of not more than 10 years with interest on the unpaid balance owing not to exceed 9%. The purchases or contracts are subject to the bid provisions of Section 6-201.7 of this Code. In single township road districts, sale of road district property including, but not limited to, machinery and equipment shall be subject to elector approval as provided in Section 30-50 of the Township Code...

605 ILCS 5/6-201.7

...Except for professional services, when the cost of construction, materials, supplies, new machinery or equipment exceeds \$20,000, the contract for such construction, materials, supplies, machinery or equipment shall be let to the lowest responsible bidder after advertising for bids at least once, and at least 10 days prior to the time set for the opening of such bids, in a newspaper published within the township or road district, or, if no newspaper is published within the township or road district then in one published within the county, or, if no newspaper is published within the county then in a newspaper having general circulation within the township or road district...

60 ILCS 1/30-50

(a) The electors may make all orders for the purchase, sale, conveyance, regulation, or use of the township's corporate property (including the direct sale or lease of single township road district property) that may be deemed conducive to the interests of its inhabitants, including the lease, for up to 10 years, or for up to 25 years if the lease is for a wireless telecommunications tower, at fair market value, of corporate property for which no use or need during the lease period is anticipated at the time of leasing....

(d) ...Anytime during the year, the township or township road district may lease or sell personal property by a vote of the township board or request of the township highway commissioner.

The clerk shall thereafter publish the resolution or personal property sale notice once in a newspaper published in the township or, if no newspaper is published in the township, in a newspaper generally circulated in the township. If no newspaper is generally circulated in the township, the clerk shall post the resolution or personal property sale notice in 5 of the most public places in the township. In addition to the foregoing publication requirements, the clerk shall post the resolution or personal property sale notice at the office of the township (if township property is involved) or at the office of the road district (if road district property is involved). The following information shall be published or posted with the resolution or personal property sale notice: (i) the date by which all bids must be received by the township or road district, which shall not be less than 30 days after the date of publication or posting, and (ii) the place, time, and date at which bids shall be opened, which shall be at a regular meeting of the township board.

...The notice and competitive bidding procedure shall not be followed when real or personal property is declared surplus by the township board or the highway commissioner and sold to another governmental body...

60 ILCS 1/85-30

Any purchase by a township for services, materials, equipment, or supplies in excess of \$20,000 (other than professional services) shall be contracted for in one of the following ways:

- (1) By a contract let to the lowest responsible bidder after advertising for bids at least once (i) in a newspaper published within the township, or (ii) if no newspaper is published within the township, then in one published within the county, or (iii) if no newspaper is published within the county, then in a newspaper having general circulation within the township.
- (2) By a contract let without advertising for bids in the case of an emergency if authorized by the township board.

Interference With Contract Submission and Award By Public Official, 720 ILCS 5/33e-6

(a) Any person who is an official of or employed by any unit of State or local government who knowingly conveys, either directly or indirectly, outside of the publicly available official invitation to bid, pre-bid conference, solicitation for contracts procedure or such procedure used in any sheltered market procurement adopted pursuant to law or ordinance by that unit of government, to any person any information concerning the specifications for such contract or the identity of any particular potential subcontractors, when inclusion of such information concerning the specifications or contractors in the bid or offer would influence the likelihood of acceptance of such bid or offer, commits a Class 4 felony. It shall not constitute a violation of this subsection to convey information intended to clarify plans or specifications regarding a public contract where such disclosure of information is also made generally available to the public.

(b) Any person who is an official of or employed by any unit of State or local government who, either directly or indirectly, knowingly informs a bidder or offeror that the bid or offer will be accepted or executed only if specified individuals are included as subcontractors commits a Class 3 felony.

(c) It shall not constitute a violation of subsection (a) of this Section where any person who is an official of or employed by any unit of State or local government follows procedures established (i) by federal, State or local minority or female owned business enterprise programs or (ii) pursuant to Section 45-57 of the Illinois Procurement Code.

(d) Any bidder or offeror who is the recipient of communications from the unit of government which he reasonably believes to be proscribed by subsections (a) or (b), and fails to inform either the Attorney General or the State's Attorney for the county in which the unit of government is located, commits a Class A misdemeanor.

(e) Any public official who knowingly awards a contract based on criteria which were not publicly disseminated via the invitation to bid, when such invitation to bid is required by law or ordinance, the pre-bid conference, or any solicitation for contracts procedure or such procedure used in any sheltered market procurement procedure adopted pursuant to statute or ordinance, commits a Class 3 felony.

(f) It shall not constitute a violation of subsection (a) for any person who is an official of or employed by any unit of State or local government to provide to any person a copy of the transcript or other summary of any pre-bid conference where such transcript or summary is also made generally available to the public.

### C. Discussion

#### i. Purchase of New Sweeper

Miller did not evidently violate any of the bidding procedures. Rather, the solicitation for bids was appropriately published, the bids were appropriately received, and processed.

To be sure, creating bid specifications aimed at a result where only one brand or make of product meets all specifications would seem to violate the spirit of the competitive bidding process, this does not necessarily mean that such conduct arises to the level of a felony offense. Through our investigation, it was learned that it is neither illegal nor uncommon when purchasing specialized equipment for an entity or company seeking to purchase an item to begin their quest by obtaining sample sets of specifications for the items they may wish to purchase and using or amending those specifications for the invitation to bid. This is evidenced here by the fact that in addition to Standard Equipment, at least one other company, RNOW, also submitted a sample set of bid specifications. Moreover, we do not necessarily find it unreasonable that a Road District would seek to purchase a product it believes best suits its needs and that its employees are most comfortable using and maintaining.

We are not in a position to determine whether Standard Equipment was the lowest “responsible” bidder. The term “lowest responsible bidder” appears in multiple Illinois statutes governing purchasing by Illinois governmental bodies. In determining whether a bidder is “responsible,” a government body should look to the ability of the bidder to meet the requirements of the contract, the qualities of the articles supplied, their conformity to the bid specifications, the suitability to the requirements of the body, the availability of support services, and the compatibility to existing equipment and delivery terms.

The requirement that a local government award a contract to the lowest responsible bidder does not require the governmental body to award the contract to the lowest bidder. The Illinois Supreme Court has opined, “In proper circumstances a contract may be awarded to one who is not the lowest bidder, where this is done in the public interest, in the exercise of discretionary power granted under the laws, without fraud, unfair dealing, or favoritism, and where there is a sound and reasonable basis for the award as made.”

Upon review of Illinois case law, we were unable to find any cases that sanction or proscribe using the specifications of a particular product to design a bid. It is also important to note that the cases analyzing whether the award of a contract to a higher bidder was appropriate are not cases where some type of criminal contract interference is alleged, and are instead civil actions brought by losing bidders.

It appears that Algonquin Township had a longstanding relationship with Elgin products and was familiar with their parts and maintenance requirements. After testing the Elgin hybrid street sweeper, this was the product the Road District employees, not necessarily Miller, desired as the machine most conducive to operation and maintenance. In compliance with the bidding procedures, the Road District publicly sought bids and publicly shared the bid specifications.

Though we did learn that Standard Equipment had donated to Miller's campaign committee for Road Commissioner, our investigation uncovered no evidence that Miller personally benefited, either through a bribe or other favor, from the purchase of the Elgin hybrid model, that he engaged in fraud or unfair dealing, or improperly conveyed privileged information. While we recognize that the campaign donations and the resulting business are unsavory, we do not believe that this in light of the fact that it was ultimately the Road District employees that lobbied for the Elgin hybrid model, provides sufficient evidence to charge criminally.

ii. Sale of 2012 Street Sweeper

The sale of the street sweeper appears lawful. Though 605 ILCS 5/6-201.17 states that in "single township road districts, sale of road district property...shall be subject to elector approval as provided by 605 ILCS 1/30-50," section 30-50 states that electors "may make all orders for the...sale...of the township's corporate property. Accordingly, electors are under no mandatory duty to "make orders" for the sale of Township property. The question arises, if they "may" sell township property, but neglect or opt not to do so, how can property in need of sale be sold? Section 30-50(d) provides that "at any time...the road district may lease or sell personal property by a vote of the township board or request of the township highway commissioner." When read together, sections 201.17 and 30-50 impart authority on both the township board, highway commissioner, and electors to sell property.

In this case, Miller "requested" that the property be sold. While there was no "sale notice" published in accordance with section 30-50(d), the Township was likely not required to make such a notification. Rather, as section 30-50(d) goes on to provide, "the notice and competitive bidding procedure shall not be followed when real or personal property is declared surplus by the...highway commissioner" and sold to "another government body." There is no statutory procedure set forth for how "property" is declared "surplus" or that such a declaration has to be made formally or in writing. However, the evidence would support the fact that the 2012 sweeper was

surplus. At the time it was sold, it was not being used by the Road District, which had already replaced it by purchasing the Elgin Hybrid model.

#### **IV. Allegation: Miller was improperly paid unused sick time.**

##### **A. Summary of the Facts**

On February 28, 2017, Miller lost his bid for reelection for Algonquin Township Highway Commissioner. It appears that in April 5, 2017, Miller filed the Highway Commissioner's Annual Report.

On April 12, 2017, Miller made a demand of \$47,381.84 in the form of a bill at the Algonquin Township's Annual Meeting for payment of unused sick pay. The sick pay was purportedly earned between 1972 and 1993 while working as an employee of the Road District. The matter was heard during the portion of the meeting designated on the agenda as "Audit of Bills." The agenda did not specify or itemize the bills to be audited. Based on the April 12, 2017 minutes and after Miller presented the demand for sick pay, Trustees Emery and Cardelli moved to delay the matter for further inquiry. Thereafter, Miller explained to the Board how the sick time policy worked and represented that the issue was fully researched by Jim Kelly, Township attorney. Kelly, who was present for the meeting, concurred with Miller's explanation. A brief recess was taken to allow Miller to gather documentation in support the sick time payment.

Thereafter, Miller submitted to the Board a memorandum purportedly authored by Tom Schober, former Algonquin Township Supervisor. Below is the memorandum:



# Algonquin Township

3702 Northwest Highway Crystal Lake, IL 60014  
Telephone (847) 639-2700  
FAX (847) 639-4529

Thomas R. Schober  
Supervisor

Robert J. Miller  
Highway Commissioner

Robert R. Kutz, Jr.  
Assessor

Maec J. Munarreto  
Town Clerk

Trustees  
John M. Anderson  
Patricia K. Fletcher  
David A. Kevez  
John W. Opatrzy

## MEMORANDUM

DATE: February 25, 1997  
TO: Bob Miller  
FROM: Tom Schober  
SUBJECT: Unused/Unpaid Sick Days:

Please be advised that an audit was taken of your past employment with the Algonquin Township Highway Department.

As an employee (not an elected official) from October 1, 1972 to April 5, 1993 you were entitled to 265 sick days. During that period of time you used 12 sick days. This leaves 253 unused/unpaid sick days. At the present time Illinois Municipal Retirement Fund allows a maximum credit of 240 unused/unpaid sick days which can be applied to your service credit upon retirement.

During the course of the investigation, we received a copy of the original February 25, 1997 Schober memorandum. The document is identical to the above except that the heading and title are properly aligned.

Miller also submitted a memorandum dated April 7, 2017. This memorandum does not identify an author and is as follows:

Date: April 7, 2017  
To: Robert J. Miller  
Subject: Unused/Unpaid Sick Days from October 1, 1972 to April 5, 1993

You are entitled to be paid for the 253 accrued, unused and unpaid sick days upon your retirement.

This reimbursement is based on your hourly rate for 1993 which was \$23.41/hr. Multiply that by an eight hour day and you receive \$187.28 per day. Multiply that \$187.28 times the 253 days and you will be paid a total of \$47,381.84.

As has been suggested by the Township's auditor, Mr. Brown, you will be paid this amount in a lump sum and you will receive a 1099 at the end of the year.

Upon presentation of these documents, the Board voted against removing Miller's sick pay claim from the monthly bills, thereby approving the lump sum payout.

No record of the purported liability of \$47,381.84 due and owing to Miller is found in any prior annual report of Miller while serving as highway commissioner.

During the course of our investigation, a letter was obtained from Kelly to Miller dated March 22, 2017. Below is a copy of this letter:

LAW OFFICES OF  
**MATUSZEWICH & KELLY, LLP**

101 N. Virginia St., Suite 150  
Crystal Lake, Illinois 60014  
(815) 459-3120 Telephone  
(815) 459-3123 Facsimile

March 22, 2017

*CONFIDENTIAL*  
*ATTORNEY-CLIENT PRIVILEGED*

VIA E-MAIL & U. S. MAIL

Mr. Robert J. Miller  
Highway Commissioner  
Algonquin Township Road District  
3702 U.S. Highway 14  
Crystal Lake, Illinois 60014

**RE: Payment of Accrued Sick Leave**

Dear Bob:

You had previously asked as to whether you or other employees of the Road District would be entitled to the payment of sick leave which had accrued prior to 1995, and in your case sick leave which had accrued prior to 1993. As you know, my opinion is that you are entitled to payment for your accrued sick leave.

You recently have inquired as to what fund should sick leave be paid from, and whether sick leave could be paid in a lump sum amount or as regular wages.

As Highway Commissioner, you are paid from the Town Fund. However, you were an employee of the Road District at the time your sick leave accrued and therefore your accrued sick leave is an obligation of the Road District. Payment of your accrued sick leave must be paid from the Road and Bridge Fund, salary line item. As you are no longer a Road District employee you can be paid in a lump sum amount and receive a 1099 for this payment. However, you will personally be responsible for self-employment taxes, as well as FICA and all other related income taxes, as these taxes will not be withdrawn from your lump sum payment. You can however be paid as a W-2 employee. It is much less expensive for the Township to pay you in a lump sum rather than as a W-2 employee.

Further, I have spoken with the Township's auditor, Mr. Brown and he has suggested that it is probably in the best interest of the Road District that your accrued sick leave be paid as a lump sum amount and that you receive a 1099 at the end of the year.

CRYSTAL LAKE, IL

CHICAGO, IL

The Illinois Municipal Retirement Fund (IMRF) does not prohibit a government employer from paying out unused sick time. In lieu of a payout, however, an employee may request that IMRF provide a pension credit for unused sick time with 20 unused sick days being equal to one month of IMRF credit. During the course of our investigation, we learned that Miller had not sought to convert his prior sick time into IMRF credit.

## B. Relevant Law

### 605 ILCS 5/6-201.15

Annually make a report in writing, showing the following:

- (1) The amount of road money received by the district and a full and detailed statement as to how and where expended and the balance, if any, unexpended.
- (2) The amount of liabilities incurred and not paid (any undetermined liabilities shall be estimated) and the determined or estimated amount owing to each creditor, who shall be named.

- (3) An inventory of all tools having a present value in excess of \$200, machinery and equipment owned by the district, and the state of repair of these tools, machinery, and equipment.
- (4) Any additional matter concerning the roads of the district the highway commissioner thinks expedient and proper to report.

### Forgery, 720 ILCS 5/17-3

- (a) A person commits forgery when, with intent to defraud, he or she knowingly:
  - (1) makes a false document or alters any document to make it false and that document is apparently capable of defrauding another; or
  - (2) issues or delivers such document knowing it to have been thus made or altered; or
  - (3) possesses, with intent to issue or deliver, any such document knowing it to have been thus made or altered; or
  - (4) unlawfully uses the digital signature, as defined in the Financial Institutions Electronic Documents and Digital Signature Act, of another; or
  - (5) unlawfully uses the signature device of another to create an electronic signature of that other person, as those terms are defined in the Electronic Commerce Security Act.
- (b) (Blank).
- (c) A document apparently capable of defrauding another includes, but is not limited to, one by which any right, obligation or power with reference to any person or property may be created, transferred, altered or terminated. A document includes any record or electronic record as those terms are defined in the Electronic Commerce Security Act. For purposes of this Section, a document also includes a Universal Price Code Label or coin.
- (c-5) For purposes of this Section, “false document” or “document that is false” includes, but is not limited to, a document whose contents are false in some material way, or that purports to have been made by another or at another time, or with different provisions, or by authority of one who did not give such authority.

### C. Discussion

First, there is insufficient evidence to charge Miller with forgery. As for the document Miller presented from Schober, the only person we were able to identify capable of verifying or repudiating the authenticity of the letter, has since passed away. While we recognize that the copy appears to be somewhat positionally skewed, a likely explanation is some type of copying malfunction. Moreover and upon comparison with Schober’s signature elsewhere, it does not appear the signature on the document in question is an imitation.

As for the memorandum with no author, there is no evidence that the memorandum contains information known by Miller to be “false” or fraudulent. Moreover, Miller never asserted who the author of the memorandum was nor that it

was written by a person with some type of special knowledge or authority over the Board.

Even if the untitled April 7, 2017 Memorandum presented by Miller to the Board were not genuine, there still remains the lingering question of whether Miller had an “intent to defraud” sufficient to establish forgery. To act “with intent to defraud means to act knowingly, and with the specific intent to deceive or cheat, for the purpose of causing financial loss to another or bringing some financial gain to oneself...” On March 22, 2017, Miller received a letter from Kelly indicating that Miller was legally entitled to the sick pay. At the Annual Meeting, Kelly confirmed that Miller was entitled to the sick time payout in the amount requested. As such, Miller had a good faith basis to believe he was owed a payout for unused sick time. Even if a document proves inauthentic or insufficient to establish Miller’s claim to sick pay, he reasonably could argue that he had no intent to “deceive or cheat” the Board because he believed, based upon the advice of the Township’s attorney, that he was entitled to the sick pay.

Second, we are unable to find any law or other authority conclusively prohibiting Miller from receiving sick pay. Even if Miller was not legally entitled to the sick time payout, we believe Kelly’s letter forecloses felony prosecution. As alluded to, criminal charges require not just proof that an act violates the law, but proof of a mind-state. In other words, proof that the person acted “knowingly” or “intentionally.” In this case, it cannot be said beyond a reasonable doubt that Miller “knowingly” misapplied funds (Misapplication of Funds), “knowingly” took unauthorized possession of the sick pay (Theft), or “knowingly” performed an act which he knew was forbidden by law (Official Misconduct). As discussed, Miller, after making a request, received a letter from the Township’s attorney sufficient to establish Miller’s belief that he was lawfully authorized to receive the payout from the Road District Fund in one lump sum.

Further, there is no evidence that Miller attempted to duplicate the benefit from his unused sick time by seeking pension credit with IMRF. That said, we understand that this issue is subject to an ongoing civil lawsuit. We believe that this is the appropriate forum to resolve this dispute as Kelly’s letter forecloses criminal prosecution.

Third, it unclear whether 605 ILCS 5/6-201.15 required Miller to itemize unused sick time in the 2017 Annual Report. There is no definition of “liability” in the Illinois Highway Code (including in Article 6, Administration of Township and District Roads) or case law clarifying what constitutes a liability for purposes of the annual report. Upon comparison to other annual reports submitted by other highway commissioners, it does not appear as though it is a common practice to list unused sick pay as a liability.

As further guidance, we considered the Comprehensive Annual Financial Report for the State of Illinois, produced by the Illinois Comptroller's Office. In the report, the Comptroller gives an overview of the proper way to account for sick time and vacation liabilities. She notes that a liability for these amounts is reported only if the liability has matured, for example, as a result of an employee resignation or retirement. Assuming Miller's sick time had not matured in 1993 when he assumed the position of Highway Commissioner within the Road District, one could argue in good faith that neither had it matured by March 31, 2017, the end of the reporting period for the 2017 Annual Report. Rather, Miller had not yet retired, resigned, or been succeeded by his predecessor.

Even if one interprets Miller's sick time as a liability, there remains the open question of whether he has to report all outstanding liabilities in an annual report or only those liabilities incurred during the fiscal year to which the report pertains. While the plain language of the statute could be reasonably interpreted either way, we believe it is certainly reasonable to conclude that the annual report need only contain annually incurred liabilities. We find support for this position in the "General Administrative Duties of the Township Highway Commissioner." This publication is prepared and published by the Illinois Department of Transportation Bureau of Local Roads and Streets and appears to be distributed, revised, and prepared in conjunction with the Illinois Technology Transfer Center, the Illinois Association of County Engineers, and the Township Officials of Illinois. With respect to the annual reports made by highway commissioners in accordance with Section 6-201.15 of the Illinois Highway Code, the manual strongly suggests that a highway commissioner in his annual report must only report those liabilities "incurred *during the year* and not paid to whom the debts are owed." One could reasonably maintain that Miller was not required to report the sick time payout in the 2017 annual report as this "liability" was incurred in 1993.

Generally speaking, a prosecutor has lost her case before it has even begun if there is a reasonable dispute as to whether the alleged act is even a crime, let alone whether the defendant performed the act.

Even if the law is interpreted as having required Miller to have reported the sick time as a liability in the 2017 Annual Report, a single accounting failure standing alone generally does not warrant felony prosecution. While Miller may have left his sick time claim off the Annual Report, there is no indication he did so for nefarious purposes or to conceal this liability. Rather, he publicly presented the claim to the Township Board at the Annual Meeting a little more than a week later. Though the Trustees entertained a motion to delay approving the sick time subject to further inquiry, they were ultimately satisfied after inspecting the disputed documentation and hearing from Miller and Kelly that the claim should be paid.

With respect to any Open Meetings Act violation, the State's Attorney's Office takes no position as this is outside the scope of our investigation. If a violation occurred, any liability would be limited to those responsible for creating the agenda and running the meeting.

**V. Allegation: Miller deleted public files from his Algonquin Township computer.**

**A. Summary of the Facts**

On January 15, 2018, the McHenry County State's Attorney's Office was emailed a copy of a report authored by Garrett Discovery entitled, "Report for Algonquin Township Highway Department." The document is a summary of a forensic analysis of the Algonquin Township server. In the report, Garrett concludes that a user logged onto the server on April 2, 2017 and installed an anti-forensic software package designed to delete data, executed that program, and thereby permanently deleted a number of files. Additionally, a user took action to remove the user profile of "commissioner" and "manager" from the "profile redirection folders."

During the course of the investigation, we learned that Keith Seda was the IT professional accessing the server on April 2, 2017. During an interview, Seda stated that he worked for a company called IT Connection, Inc., which was an IT provider for small businesses who do not have their own IT department. Seda stated further that the Road District has been a long time client. Over the years, Seda and IT Solutions have assisted the Road District with new phones, new computers, and all other IT issues.

In response to the alleged "wiping" of documents from Road District computers, Seda stated that after Miller lost the primary election in March of 2017, Miller called Seda and requested that Seda assist the Road District in getting computers set up for the new highway commissioner. Seda stated further that Miller informed Seda that Miller had received information that the new highway commissioner would be conducting a forensic audit of the computers and Miller wanted to ensure all his personal documents and personal information were removed from the computers. Seda stated further that, thereafter, he responded to the Road District and assisted Robert and Anna May Miller in removing personal documents from Road District computers. Seda indicated that the Millers were aware of the need to retain documents related to Township business and wanted to ensure that any and all business documents were saved to the server. Seda commented that they took this to a "ridiculous" level, even saving a Word document from 1997 that read "back in 15 minutes" that was once hung on an office door. Once the saving of business documents

was complete, Seda assisted Robert and Anna May Miller in deleting their personal files through the use of an anti-forensic software package, CCleaner.

Seda also indicated that he deleted the user profiles for Robert and Anna May Miller and created new profiles for the new highway commissioner to use. Those new profiles were titled “Highway Commissioner” and “Officer Manager.” Seda stated that the backing up of business files and wiping of personal information was a “typical” process when someone gets a new computer or separates from employment. Seda stated that he did not find anything suspicious about his interactions with the Millers or his work on the Road District’s behalf.

Seda stated further that he removed the hard drives from both computers and installed new ones. Seda stated further that he left the removed hard drives in the possession of Miller. Seda stated further that these hard drives were at the end of their useful life and should have been discarded.

During a second interview with Seda, he accessed the Township’s shared server and showed us 4,184 files present in the “Road Administration” folder. He indicated that this was the folder he used to store the files from Anna May and Robert Miller’s computers. Seda stated further that the current Highway Commissioner and his assistant were trained by Seda on how to access the files. According to Seda, the current Highway Commissioner’s assistant exclaimed “look, here are all the missing files” during the training.

## B. Relevant Law

### Local Records Act, 50 ILCS 205/4(a)

Except as otherwise provided in subsection (b) of this Section, all public records made or received by, or under the authority of, or coming into the custody, control or possession of any officer or agency shall not be mutilated, destroyed, transferred, removed or otherwise damaged or disposed of, in whole or in part, except as provided by law. Any person who knowingly, without lawful authority and with the intent to defraud any party, public officer, or entity, alters, destroys, defaces, removes, or conceals any public record commits a Class 4 felony...

### Local Records Act, 50 ILCS 205/3

Except where the context indicates otherwise, the terms used in this Act are defined as follows: ... “Public record” means any book, paper, map, photograph, born-digital electronic material, digitized electronic material, electronic material with a combination of digitized and born-digital material, or other official documentary material, regardless of physical form or characteristics, ***made, produced, executed or received by any agency or officer pursuant to law or in connection with the transaction of public business*** and preserved or appropriate for preservation by such agency or

officer, or any successor thereof, as evidence of the organization, function, policies, decisions, procedures, or other activities thereof, or because of the informational data contained therein...

Local Records Act, 50 ILCS 205/9

Nonrecord materials or materials not included within the definition of records as contained in this Act may be destroyed at any time by the agency in possession of such materials without the prior approval of the Commission. The Commission may formulate advisory procedures and interpretations to guide in the disposition of nonrecord materials.

C. Discussion

There is insufficient evidence to charge Miller for destroying records. It is not illegal under the above statutory authority to destroy personal documents unrelated to public business without prior approval. Rather, only those documents “made, produced, executed or received by any agency or officer pursuant to law or in connection with the transaction of public business” must be retained. In view of the fact that the documents deleted are irretrievable, establishing that public documents were deleted would be impossible.

VI. Allegations:

- 1) During Miller’s tenure as highway commissioner, he registered his personal vehicles on the Road District’s I-PASS account;
- 2) On May 25, 2017, one of Miller’s personal vehicles accessed the Road District’s I-PASS account; and
- 3) On October 29, 2017, Miller electronically registered personal vehicles on the Road District’s I-PASS account.

A. Summary of the Facts

Based on the review of records returned by the Illinois Tollway regarding the I-PASS usage for the corporate account of Algonquin Township Road District in the name of Robert Miller, three personal vehicles belonging to the Miller family were registered to the Algonquin Township I-PASS account: license number BMG603, Acura registered to Anna May Miller; license number 7379126, Corvette registered to Miller, and license number 823775S, a Ford F250 registered to Miller. This was in addition to 16 other vehicles all bearing municipal plates and belonging to the Road District. Based on interviews of Township staff, Miller regularly used the Ford F250 for work purposes.

During Miller's tenure, I-PASS had provided six transponders to the Road District. Any of those transponders could have been on-boarded with any of the registered vehicles. If a vehicle passes through an I-PASS checkpoint with a transponder in vehicle, the I-PASS checkpoint disarms and no picture or other data identifying the vehicle is taken. The Illinois Tollway does not retain any information or data regarding vehicles passing through I-PASS checkpoints with a transponder in the car. If, conversely, a vehicle passes through the checkpoint and no transponder is detected, the system takes a picture of the license plate. If the license plate is a registered vehicle, the "virtual transponder system" activates, no ticket issues, and the account is charged as if a transponder was in the car. The Illinois Tollway "virtual transponder" system does retain records of the license plate and date and time that the vehicle passed through the checkpoint.

Between 2012 and 2016, the "virtual transponder" system detected one vehicle owned by the Miller family, license number MG603, passing through checkpoints on various dates. The total cost was \$8.40. After Miller's term as highway commissioner expired, only one of the vehicles registered to the Miller family, license number 823775, was detected on the virtual transponder system. This occurred on May 25, 2017. The cost incurred was \$0.45. Please note, this cost was incurred by Miller's vehicle after his term in office had expired.

On July 12, 2017, Gasser contacted the Illinois Tollway, changed the billing information to a new credit card, and removed the vehicles belonging to Miller's family. That same day, someone, presumably Miller, accessed the automated system, restored Miller's contact information, requested a new transponder, and placed the account on auto-pay with a personal credit card.

On October 29, 2017, the Illinois Tollway automated system is accessed online, again presumably by Miller. He added a motorcycle, license number 2220766 and reactivated license number 739126. One hour later, Gasser contacted the Illinois Tollway and changed all vehicles registered to Miller expired and another municipal plate is registered to the account.

## B. Discussion

Our investigation uncovered no evidence that the Acura with license plate MG603 was not being operated for Road District purposes when it passed through I-PASS checkpoints and incurred \$8.40 in charges over the course of four years.

As for the kerfuffle over the I-PASS accounts after May, we view this as more political horseplay than a crime. The I-PASS account was registered in Miller's name. After Miller left office, the I-PASS account was not immediately adjusted by any Road District official to remove Miller as the registered account holder, remove his personal

vehicles, or change the passwords. Rather, it was not until July, 2017 that the appropriate changes were made. On July 12, 2017, when Miller, as the registered account holder, received notice that his vehicles had been removed on what he deemed his account, he sought to correct the situation by reactivating the account in his name and paying for the account with his own credit card.

On October 29, 2017, Miller, likely realizing that his personal vehicle with license number 7379126 was no longer active, sought to reactivate it and, again, used his own money to pay the I-PASS bill. Gasser, also on the account, received notice of the changes and, finally, took the appropriate steps to change the password and claim the account exclusively for the Road District.

## **VII. Allegation: Miller improperly supplied the Illinois Railway Museum (IRM) with Road District salt.**

### **A. Summary of the Facts**

Dave Diamond was the Riley Township Highway Commissioner between 2014 and 2017 and facilities director for the Illinois Railway Museum (IRM). Several years ago, the IRM began having a holiday event, the Happy Holiday Railway, where Santa would visit children on a train. Diamond stated that around December of 2015, the IRM decided to expand the event. As such, the IRM believed they were in need of road salt for the grounds where the event was to be held to ensure safety. Diamond stated further that he requested to purchase 5 yards of salt from Road District. Diamond stated further that Miller indicated that he would donate the salt. Diamond stated further that the estimated cost of this salt was around \$200. Diamond stated further that the first year IRM received the donation of salt, the weather was mild and much of the salt was left over. Diamond stated further that Miller informed Diamond to provide the salt to Coral Township.

In 2016, Diamond stated that he again requested that the Road District provide salt for the IRM holiday event and Miller agreed. Due to the inclement weather, Diamond stated further that he requested 6-7 yards of salt, the cost being \$300-\$500. Diamond stated further that Miller agreed and donated the salt to the IRM.

During the course of our investigation, we uncovered an email from Diamond to Miller, dated December 1, 2014. In the email, Diamond states, “[i]t’s my annual request to see if you would be so kind once again to donate a load of salt for the IRM Christmas event.” That same day, Miller responds by email, “[y]es, Dave we would like to make that donation again.”

In 2014, 2015, and 2016, no resolution was passed declaring any of the Algonquin Township Road District's property surplus for purposes of donating it to the IRM.

## B. Relevant Law

### 60 ILCS 1/30-53

The majority of electors present at an annual or special town meeting may declare property of the township to be surplus for purposes of donating the property to a historical society or other not-for-profit corporation as provided in Section 80-75.

### 60 ILCS 1/80-75

Any property declared to be surplus by the electors under Section 30-53 may by resolution of the town board of trustees be donated to a historical society or other not-for-profit corporation. The resolution shall set forth the historical society or other not-for-profit corporation's intended use of the property, and the board of trustees may require that the transfer be subject to a reversion of the property if the property is no longer used for its original intended use by the historical society or other non-for-profit organization. The resolution shall authorize the township supervisor to execute all documents necessary to complete the transfer of the property."

### Official Misconduct, 720 ILCS 5/33-3

See section I.

### Theft, 720 ILCS 5/16-1

See section I.

## C. Discussion

Prior to Miller donating Road District salt to the IRM, the electors had not declared it surplus. While the evidence here may be sufficient to charge Miller with Official Misconduct (performs an act in excess of his lawful authority) and theft (obtains unauthorized control over property), we do not believe such charges to be in the public interest. Drawing upon the aforementioned factors set forth by the American Bar Association, there is no indication that Miller's conduct resulted in anything beyond *de minimis* public harm. While it is true that taxpayers in Algonquin Township may have been deprived of the benefit of a few of the thousands of yards of salt ordered each year, this did not risk or result in a shortage of salt or jeopardize road safety.

There is no evidence that Miller derived a personal benefit for the salt provision in the form of a kickback, campaign donation, or other favor. There is no evidence that Miller had any ulterior motive beyond his desire to modestly assist a non-profit

organization in making a public event for children and families a success. Nor is there any indication that had Miller sought elector approval, it would have been denied. Moreover, we are not convinced that children and families enjoying a holiday event is the type “personal benefit” the legislature had in mind when it passed subsection (a)(3) of the Official Misconduct statute. While Miller’s actions might be deemed “unlawful” upon a mechanical application of the law, we believe his actions here are more an oversight or indiscretion resulting from poor internal controls as opposed to self-serving public corruption wherein the People would have an interest in bearing the expense of a prolonged felony prosecution.

Further, the Township and/or Road District has an adequate civil remedy for any improper distribution of salt.

**VIII. Allegation: Miller improperly purchased two plane tickets to New Orleans in 2008 for individuals not employed with the Road District.**

**A. Summary of the Facts**

Township financial records reveal that in July of 2008, two plane tickets to New Orleans were purchased on the Road District credit card. The names on these tickets are Rebecca Lee and what is believed to be her child. It should be noted that Lee is the daughter of Miller and wife of Road District employee Derek Lee. These plane tickets were approved by the Trustees.

Lutzow indicated that in the past, the Township would pay for the plane tickets of family members to accompany employees during travel to work related conferences. Whether these plane tickets were so Rebecca Lee could accompany Derek Lee on a work-related trip is unknown.

**B. Relevant Law**

Misapplication of Funds, 720 ILCS 5/33E-16.

*See* section I.

Official Misconduct, 720 ILCS 5/33-3

*See* section I.

Theft, 720 ILCS 5/16-1

*See* section I.

### C. Discussion

We are hardpressed to recognize any public benefit derived from using taxpayer money to purchase plane tickets for family members of public employees. However, this matter was not pursued further as, even if the spending amounts to a criminal offense, it is beyond the statute of limitations.

The general limitation on felony prosecutions extends to 3 years past the date of the offense. While this matter would be generally barred, there is an exception for any offense based upon misconduct in office by a public officer or employee. Pursuant to 720 ILCS 5/3-6,

A prosecution for any offense based upon misconduct in office by a public officer or employee may be commenced within one year after discovery of the offense by a person having a legal duty to report such offense, or in the absence of such discovery, within one year after the proper prosecuting authority becomes aware of the offense. However, in no such case is the period of limitation so extended more than 3 years beyond the expiration of the period otherwise applicable.

This exception allows the State to commence such a prosecution within one year after discovery of the offense, however, in no case more than 3 years beyond the expiration of the period otherwise applicable; the period otherwise applicable being 3 years. In other words, one year beyond the date of discovery of the offense, but in no case more than 6 years from the date of the offense.

We are aware that under 720 ILCS 5/3-7, the period that “the defendant is a public officer and the offense charged is theft of public funds while in public office” is excluded from the limitations period. However, we do not believe that theft is the appropriate charge. In particular, we do not believe we can prove beyond a reasonable doubt Miller or anyone else that authorized the purchase of the plane tickets “knowingly” “exerted unauthorized control” over public funds. Rather, the purchase was explicitly authorized and approved by the Township Board.

**IX. Allegation: Miller purchased a Ford F250 with Township funds and without following the appropriate bidding procedures and, thereafter, retained the truck after leaving office.**

#### A. Summary of the Facts

The truck in question is a 2005 Ford F250 Super Duty Black Extended Cab Pickup bearing Illinois registration 823775S-B. Based on a review of the Secretary of State records pertaining to the truck, it was purchased from the Al Piemonte Ford dealership in Arlington Heights, Illinois on July 5, 2005 by a purchaser unrelated to

Miller. Soon thereafter, the registration was changed from Illinois to Wisconsin. In March of 2008, the truck was repossessed by Landmark Credit Union. Landmark Credit Union sold the truck to American Auto Sales Inc., located in Algonquin, Illinois on April 2, 2008. On November 26, 2008 the truck was sold to AMM enterprises, Inc/Robert Miller and the vehicle has remained titled and licensed to Miller since.

There is no indication that at any time this vehicle was owned by Algonquin Township Road District or purchased with Road District or Township funds.

## B. Discussion

The allegation is unfounded.

## X. **Allegation: Miller purchased Equipment in 2015 in violation of competitive bidding procedures.**

### A. Summary of the Facts

In 2015, the Road District purchased two John Deere 4066R compact Utility Tractors and two John Deere MX5 Lift Type Rotary Cutters (lawnmowers). The total purchase price for each tractor and each rotary cutter was \$43,275 and \$2,548, respectively. Collectively, the total price of the purchase was \$91,360 less \$18,000 due to the trade in of two 2005 utility tractors and two mowers.

Of note, on the purchase orders, there is a reference to the Illinois Association of County Board Members (IACBM), member classification 12-04-00777-A.

The IACB is a non-profit cooperative made up of hundreds of smaller units of government in Illinois. One of the programs run through the IACBM is the John Deere Discount Program. This Program provides a competitive bid process whereby one Illinois unit of government solicits bids on behalf of others for building and maintenance equipment using an authorized competitive bidding process.

## B. Relevant Law

### Illinois Government Joint Purchasing Act, 30 ILCS 525/1

..."Governmental unit" means State of Illinois, any State agency as defined in Section 1-15.100 of the Illinois Procurement Code, officers of the State of Illinois, any public authority which has the power to tax, or any other public entity created by statute.

### Illinois Government Joint Purchasing Act, 30 ILCS 525/2

(a) Any governmental unit, except a governmental unit subject to the jurisdiction of a

chief procurement officer established in Section 10-20 of the Illinois Procurement Code, may purchase personal property, supplies and services jointly with one or more other governmental units. All such joint purchases shall be by competitive solicitation as provided in Section 4, except as otherwise provided in this Act. The provisions of any other acts under which a governmental unit operates which refer to purchases and procedures in connection therewith shall be superseded by the provisions of this Act when the governmental units are exercising the joint powers created by this Act.

#### Illinois Government Joint Purchasing Act, 30 ILCS 525/3

Under any agreement of governmental units that desire to make joint purchases pursuant to subsection (a) of Section 2, one of the governmental units shall conduct the competitive procurement process. Where the State of Illinois is a party to the joint purchase agreement, the appropriate chief procurement officer shall conduct or authorize the competitive procurement process. Expenses of such competitive procurement process may be shared by the participating governmental units in proportion to the amount of personal property, supplies or services each unit purchases.

When the State of Illinois is a party to the joint purchase agreement pursuant to subsection (a) of Section 2, the acceptance of responses to the competitive procurement process shall be in accordance with the Illinois Procurement Code and rules promulgated under that Code. When the State of Illinois is not a party to the joint purchase agreement, the acceptance of responses to the competitive procurement process shall be governed by the agreement.

The supplies or services involved shall be distributed or rendered directly to each governmental unit taking part in the purchase. The person selling the personal property, supplies or services may bill each governmental unit separately for its proportionate share of the cost of the personal property, supplies or services purchased.

The credit or liability of each governmental unit shall remain separate and distinct. Disputes between contractors and governmental units or qualified not-for-profit agencies shall be resolved between the immediate parties.

#### C. Discussion

With respect to the purchase of the John Deere tractors and mowers by the Road District, the matter was competitively bid out of Rock Island County, Illinois on March 14, 2014 in accordance with the Illinois Government Joint Purchasing Act. The allegation is unfounded.

## XI. Conclusion and Recommendations

Though not appropriately redressed through criminal charges, this report has plainly set forth spending and decision-making that do more than merely create an appearance of incompetence, guile, and impropriety. We believe, however, that these failures go beyond any individual and point to a larger, systemic breakdown.

First, the statutory foundation upon which township government is built is deeply flawed. During the course of our investigation, we extensively reviewed the Township and Highway Codes and found them to be entirely unclear, self-contradictory, and interminable. We are skeptical that anyone involved, whether a highway commissioner, trustees, or electors, can reasonably acquire a straightforward understanding of their duties and responsibilities under these disjointed and sprawling statutes.

We are specifically dismayed that the Highway Code bestows such unfettered discretion on the highway commissioner over road district operations and the acutely sensitive area of spending. As one employee commented during an interview, “the only difference between the highway commissioner and God is that the highway commissioner gets a truck.”

Second, we have concluded that Algonquin Township and its elected officials failed to impose and enforce the most basic of internal controls that could have prevented many of the excesses described herein. Lutzow’s shocking description of the Township’s spending policy, “everyone just did [what] they thought was correct” amply sums up its deficiencies.

Third, we believe trustees should have approached their responsibility as auditors more diligently. In township government, trustees are one of the few limits on road district spending. They have authority, should they choose to exercise it, “to examine and audit the township and road district accounts before any bills are paid...”, “examine the accounts of the...commissioner of highways...for all moneys received and distributed by them...”, and “examine and audit...all charges and claims against their road district...and...the compensation of all township officers.” If trustees were not satisfied with the amount of access to or time afforded to review these bills and ensure the propriety of spending, they should have demanded the necessary process changes.

Lastly, we believe that the off-year Township elections that feature notoriously poor voter turnout do not adequately allow the disinfectant and quality assurance properties of the democratic process to operate.

If it has not already, we recommend that Algonquin Township:

1. Establish a detailed policy for payment or reimbursement of all expenses in keeping with the Internal Revenue Service's "Fringe Benefits Guide, Office of Federal, State, and Local Governments." Have the Highway Commissioner adopt said policy and pass a resolution or ordinance prohibiting Trustees or any other Township official from approving expenses that are inconsistent with this policy.
2. Create a detailed policy for approving all other spending by setting forth all possible categories of spending deemed appropriate for "road purposes." Have the Highway Commissioner adopt said policy and pass a resolution or ordinance prohibiting Trustees or any other Township official from approving expenses that are inconsistent with this policy.
3. Prohibit Trustees or any Township official from approving any Road District employee compensation that is not specifically provided for in an employee's written and/or labor contract and in accord with the Road District's Personnel Policy.
4. Pass and adopt a purchasing ordinance setting forth the detailed procedures for competitive bidding and non-competitive procurements and entering into professional service contracts. A good example of such an ordinance is the McHenry County Purchasing Ordinance.
5. Pass an anti-nepotism resolution or ordinance that is adopted by the Highway Commissioner.
6. Establish a process to ensure that all Road District bills and expenses accrued but not yet paid along with a written explanation of the nature and purpose of the expense are accessible to Trustees at any time.
7. Carefully consider options to abolish the Road District and/or Township through consolidation.