

STATE BOARD OF ACCOUNTS
302 West Washington Street
Room E418
INDIANAPOLIS, INDIANA 46204-2769

SUPPLEMENTAL COMPLIANCE REPORT

OF

TOWN OF PAOLI

ORANGE COUNTY, INDIANA

January 1, 2012 to December 31, 2013



FILED
09/01/2017

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SCHEDULE OF OFFICIALS

<u>Office</u>	<u>Official</u>	<u>Term</u>
Clerk-Treasurer	Amy J. Morris	01-01-12 to 12-31-19
President of the Town Council	Mark A. Jones	01-01-12 to 12-31-12
	Gary N. Barnett	01-01-13 to 12-31-13
	Mark A. Jones	01-01-14 to 12-31-14
	Michael A. Harkness	01-01-15 to 12-31-15
	William E. Chastain	01-01-16 to 12-31-16
	Carolyn N. Clements	01-01-17 to 12-31-17



STATE OF INDIANA
AN EQUAL OPPORTUNITY EMPLOYER

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TO: THE OFFICIALS OF THE TOWN OF PAOLI, ORANGE COUNTY, INDIANA

This report is supplemental to our examination report of the Town of Paoli (Town), for the period from January 1, 2012 to December 31, 2013. It has been provided as a separate report so that the reader may easily identify any Examination Results and Comments that pertain to the Town Council. It should be read in conjunction with our Financial Statement Examination Report of the Town, which provides our opinion on the Town's financial statement. This report may be found at www.in.gov/sboa/.

As authorized under Indiana Code 5-11-1, we performed procedures to determine compliance with applicable Indiana laws and uniform compliance guidelines established by the Indiana State Board of Accounts. The Examination Results and Comments contained herein describe the identified reportable instances of noncompliance found as a result of these procedures. Our tests were not designed to identify all instances of noncompliance; therefore, noncompliance may exist that is unidentified.

Any Official Response to the Examination Results and Comments, incorporated within this report, was not verified for accuracy.

Paul D. Joyce
Paul D. Joyce, CPA
State Examiner

January 24, 2017

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TOWN COUNCIL
TOWN OF PAOLI

TOWN COUNCIL
TOWN OF PAOLI
EXAMINATION RESULTS AND COMMENTS

COMPENSATION AND BENEFIT OVERPAYMENTS TO ELECTED OFFICIALS

The 2012 compensation for all employees, including elected officials, of the Town was established by Ordinance Number 2011-10, adopted on December 30, 2011. The compensation for several non-elected positions was amended by Ordinance Number 2012-01, adopted on January 3, 2012. The 2013 compensation for all employees, including elected officials, was established by Ordinance Number 2012-15, adopted on December 27, 2012.

The Town Council approved paying all employees, including elected officials, bonuses of \$500 each in 2012 and 2013. The bonuses were paid to the elected officials on December 17, 2012, and December 6, 2013. The payment of the bonuses increased the amount of compensation originally approved to be paid to the elected Clerk-Treasurer and the five elected Town Council members during the years 2012 and 2013.

Salary Ordinance Number 2012-01, Amended Salary Ordinance for 2012, reads in part:

"WHEREAS, on December 30, 2011, the Town Council of the Town of Paoli, . . . adopted Ordinance Number 2011-10, a Salary Ordinance for 2012, which established salaries for employee of the Town of Paoli; and

WHEREAS, it is necessary to amend the salaries set forth in Ordinance Number 2011-10 as follows: . . .

Position	Rate
Clerk-Treasurer	\$44,601.90 Annual
Town Council	\$6,000 Annual . . . "

Salary Ordinance Number 2012-15, Salary Ordinance for 2013, reads in part:

". . . BE IT HEREBY ORDAINED, that the following salaries are hereby established for employees of the Town of Paoli, Indiana, effective January 1, 2013:

Town Council - \$6,000 (annually)

Clerk-Treasurer - \$44,603.00 (annually) . . . "

The Board Minutes from the Town Council meeting held November 20, 2012, states in part:

"Under old business, employee bonuses were once again discussed in lieu of raises. Councilman Jones made the motion to give all full time employees and department heads a \$500.00 bonus by year end coming from appropriate departments and police coming from casino. Councilman Meadows provided the second. Motion carried unanimously in a roll call vote."

The Board Minutes from the Town Council meeting held November 19, 2013, states in part:

"Council President Barnett spoke about an employee bonus in place of a pay raise. Councilman Harkness made the motion to pay to each employee a net bonus of \$500.00. Councilman Meadows provided the second. Motion carried unanimously in a roll call."

TOWN COUNCIL
TOWN OF PAOLI
EXAMINATION RESULTS AND COMMENTS
(Continued)

	Annual Salaries per Approved Salary Ordinances Number 2011-10 and Number 2012-15	Annual Compensation Paid	Amount Paid in Excess of Annual Approved Salaries
2012:			
Clerk Treasurer - Amy J. Morris	\$ 44,601.90	\$ 45,159.31	\$ 557.41
Town Council Member - Gary N. Barnett	6,000.00	6,557.41	557.41
Town Council Member - Michael A. Harkness	6,000.00	6,557.41	557.41
Town Council Member - Mark A. Jones	6,000.00	6,529.94	529.94
Town Council Member - Louanne Lashbrook	6,000.00	6,557.41	557.41
Town Council Member - Jerry Meadows	6,000.00	6,557.41	557.41
2013:			
Clerk Treasurer - Amy J. Morris	\$ 44,603.00	\$ 45,173.13	\$ 570.13
Town Council Member - Gary N. Barnett	6,000.00	6,570.13	570.13
Town Council Member - Michael A. Harkness	6,000.00	6,570.13	570.13
Town Council Member - Mark A. Jones	6,000.00	6,541.42	541.42
Town Council Member - Louanne Lashbrook	5,000.00	5,000.00	-
Town Council Member - Jerry Meadows	6,000.00	6,570.13	570.13
Town Council Member - William E. Chastain	500.00	500.00	-

Indiana Code 36-5-3-2 states in part:

"(a) As used in this section, 'compensation' means the total of all money paid to an elected town officer for performing duties as a town officer, regardless of the source of funds from which the money is paid.

(b) The town legislative body shall, by ordinance, fix the compensation of its own members, the town clerk-treasurer . . .

(c) The compensation of an elected town officer may not be changed in the year for which it is fixed . . ."

The amount of increased compensation paid to the elected officials for the years 2012 and 2013 is summarized below.

We requested that Amy J. Morris, Clerk-Treasurer; Gary N. Barnett, Town Council member; Michael A. Harkness, Town Council member; Mark A. Jones, former Town Council member; Louanne Lashbrook, former Town Council member; and the estate of Jerry Meadows, Town Council member (deceased); reimburse the Town of Paoli for the overpayments of compensation paid to elected officials. (See Summary of Charges, page 23)

TOWN COUNCIL
TOWN OF PAOLI
EXAMINATION RESULTS AND COMMENTS
(Continued)

OFFICIAL BOND COVERAGE

The Town obtained Public Officials' Bonds for Amy J. Morris, Clerk-Treasurer, as follows:

Amy J. Morris

Surety Company	Term	Amount
RLI Insurance Company	January 1, 2012 to January 1, 2013	\$ 300,000
RLI Insurance Company, Continuation Certificate	January 1, 2013 to January 1, 2014	300,000

The Town obtained Public Officials' Bonds for the Town Council as follows:

Board of Directors and Superintendent

Surety Company	Term	Amount
RLI Insurance Company, Continuation Certificate	May 9, 2012 to May 9, 2013	\$ 10,000
RLI Insurance Company, Continuation Certificate	May 9, 2013 to May 9, 2014	10,000

LEGAL OPINION REGARDING PAYMENTS
TO PAOLI TOWN COUNCIL AND
CLERK-TREASURER/UTILITY OFFICE MANAGER

The Town Council of the Town of Paoli, Indiana, has asked our firm to render a legal opinion concerning the allegations contained in the State Board of Accounts Examination Results and Comments for the years 2012 – 2013 and 2014 – 2016. The issue has to do with bonuses of \$500.00 that were paid to Council members and the Clerk-Treasurer, and to an August 3, 2016 salary for utility office manager established by the Town Council for additional services to Town Utilities performed by the Clerk-Treasurer.

I. SUMMARY OF OPINION

None of the Town Council members, former Town Council members or Clerk-Treasurer was guilty of malfeasance, misfeasance or nonfeasance. For the individuals to be responsible for a payback, under IC 5-11-5-1(a), malfeasance, misfeasance or nonfeasance must occur. Funds must be misappropriated, diverted or unaccounted for.

The Clerk-Treasurer clearly is not responsible for repayment for either pay as Utility Office Manager or for bonuses received, because she took no action whatsoever to receive the pay as Utility Office Manager or for a bonus.

Nor are any current Council members or former Council members responsible for repayment because the issue involved is only a construction of a statute, IC 36-5-3-2. The plain reading of the statute indicates that (c) which does not allow change in the compensation of an elected town officer in the year for which it is fixed appears before subparagraph (d), which allows additional compensation for services concerning the utilities of the town.

A business such as the Town of Paoli utilities only pays bonuses when there are sufficient funds available from the revenues of the business to pay. Common sense and good business practice and a literal reading of the statute indicate that bonuses for services to a utility are permitted even though awarded after the first of the year.

No funds of the Town of Paoli were misappropriated, diverted or unaccounted for.

Finally, if the bonus has once been paid, it may not be reduced after the first year according to the plain language of subparagraph (c) of IC 36-5-3-2.

Therefore, as will be seen in detail following, none of the present Town Council, former Town Council or Clerk-Treasurer is liable to repay any sums.

If it is the position of the State Board of Accounts that bonuses are not to be paid during the year, and the salary for managing the utility may not be awarded mid-year, then the Town of Paoli should adhere to that ruling in the future, even though it disagrees with the legal analysis.

II. FACTS

The factual history as related in the preliminary Examination Results and Comments is as follows:

“COMPENSATION AND BENEFIT OVERPAYMENTS TO ELECTED OFFICIALS

The 2012 salaries for all employees, including elected officials, of the Town of Paoli were established by Ordinance Number 2011-10, adopted on December 30, 2011. The salaries for several non-elected positions were amended by Ordinance Number 2012-01 adopted on January 3, 2012. The 2013 salaries for all employees, including elected officials, of the Town of Paoli were established by Ordinance Number 2012-15, adopted on December 27, 2012.

The Town Council approved paying all employees, including elected officials, bonuses of \$500 each in 2012 and 2013. The bonuses were paid to the elected officials on December 17, 2012 and December 6, 2013. The payment of the bonuses increased the amount of compensation originally approved to be paid to the elected Clerk Treasurer and the five elected Town Council members during the years 2012 and 2013.

Salary Ordinance Number 2012-01, Amended Salary Ordinance for 2012, reads in part:

“WHEREAS, on December 30, 2011, the Town Council of the Town of Paoli, ...adopted Ordinance Number 2011-10, a Salary Ordinance for 2012, which established salaries for employee of the Town of Paoli; and

WHEREAS, it is necessary to amend the salaries set forth in Ordinance Number 2011-10 as follows: ...

Position	Rate
Clerk-Treasurer	\$44,601.90 Annual
Town Council	\$6,000 Annual ...”

The 2013 salaries for all employees, including elected officials, of the Town of Paoli were established by Ordinance Number 2012-15, adopted on December 27, 2012.

Salary Ordinance Number 2012-15, Salary Ordinance for 2013, reads in part:

“... BE IT HEREBY ORDAINED, that the following salaries are hereby established for employees of the Town of Paoli, Indiana, effective January 1, 2013:

Town Council - \$6,000 (annually)

Clerk-Treasurer - \$44,603.00 (annually)

The Board Minutes from the Town Council meeting held November 20, 2012 states in part:

“Under old business, employee bonuses were once again discussed in lieu of raises. Councilman Jones made the motion to give all full time employees and department heads a \$500.00 bonus by year end coming from appropriate departments and police coming from casino. Councilman Meadows provided the second. Motion carried unanimously on a roll call vote.”

The Board Minutes from the Town Council meeting held November 19, 2013 states in part:

“Council President Barnett spoke about an employee bonus in place of a pay raise. Councilman Harkness made the motion to pay to each employee a net bonus of \$500.00. Councilman Meadows provided the second. Motion carried unanimously in a roll call.”

COMPENSATION AND BENEFIT OVERPAYMENTS TO ELECTED OFFICIALS FOR 2014

The 2014 salaries for all employees, including elected officials, of the Town of Paoli were established by Ordinance Number 2013-13, Salary Ordinance for 2014, adopted on December 30, 2013. The salaries for several positions were amended by Ordinance Number 2014-15, Amended Salary Ordinance for 2014, adopted on May 20, 2014.

The Town Council approved paying all employees, including elected officials, bonuses of \$500 each in 2014. The bonuses were paid to the elected officials on November 26, 2014. The increase in salaries as approved by Ordinance Number 2014-15, and the payment of the bonuses increased the amount of compensation ordinarily approved to be paid to the elected Clerk Treasurer and the elected Town Council during the year 2014.

Ordinance Number 2013-13, Salary Ordinance for 2014, reads in part:

“... BE IT HEREBY ORDAINED, that the following salaries are hereby established for employees of the Town of Paoli, Indiana effective January 1, 2014:

Town Council - \$6,000 (annually)

Clerk-Treasurer - \$44,603.00 (annually) ...”

Ordinance Number 2014-15, Amended Salary Ordinance for 2014, reads in part:

“WHEREAS, it has been determined that it is necessary for the Town Council of the Town of Paoli, Indiana to amend its Salary Ordinance for the year 2014, pertaining to Town employees, effective 12:01 A.M., May 21, 2014 ...

BE IT HEREBY ORDAINED, that the following salaries are hereby established for employees of the Town of Paoli, Indiana, and effective May 21, 2014:

Town Council - \$7,200 (annually)...

Clerk-Treasurer - \$48,172.80 (annually)...

Prior Ordinances

All ordinances and/or parts of ordinances in conflict herewith are hereby repealed.”

The Board Minutes from the Town Council meeting held November 18, 2014, states in part:

“Under New Business, Council President Jones discussed giving employees’ bonuses this year. Councilman Jones made a motion to approve Christmas bonuses as we did last year. Councilman Barnett provided the second. Motion carried unanimously in a roll call vote. (November 19, 2013 Meeting the motion was made by Councilman Harkness to pay each employee a net bonus of \$500.00 and seconded by Councilman Meadows.)”

COMPENSATION AND BENEFIT OVERPAYMENTS TO ELECTED OFFICIALS FOR 2015 AND 2016

For the years 2015 and 2016, we performed procedures to determine compliance with applicable Indiana laws and uniform compliance guidelines established by the Indiana State Board of Accounts and were limited to records associated with the compensation and benefits paid to elected officials. This comment is a result of those procedures.

The 2016 salaries for all employees, including elected officials, of the Town of Paoli were established by Ordinance Number 2014-20, Salary Ordinance for 2015, adopted on December 2, 2014.

The Town Council approved paying certain employees, including elected officials, bonuses of \$500 each in 2015. The bonuses were paid to the elected officials on November 15, 2015.

The 2016 salaries for all employees, including elected officials, of the Town of Paoli were established by Ordinance Number 2015-16, Salary Ordinance for 2016, adopted on December 22, 2015. On August 16, 2016, the Town Council adopted Ordinance Number 2016-04, Amended Salary Ordinance for 2016. The Ordinance created an additional position, Clerk-Treasurer Utility Office Manager. The salary for this position of \$373.60 per week was to be paid to the Clerk Treasurer, effective August 3, 2016.

The payment of the bonuses increased the amount of compensation originally approved to be paid to the elected Clerk Treasurer and the elected Town Council members during the year 2015. The payment of the salary for the Clerk-Treasurer Utility Office Manager position increased the amount of compensation originally approved to be paid to the elected Clerk Treasurer during the year 2016.

Salary Ordinance Number 2014-20, Salary ordinance for 2015, reads in part:

“... NOW THEREFORE, BE IT HEREBY ORDAINED,
that the following salaries are hereby established for employees of the
Town of Paoli, Indiana, and effective January 1, 2015:

Town Council - \$600 (monthly) ...

Clerk-Treasurer - \$926.40 weekly ...”

Ordinance Number 2015 -2016, Salary Ordinance for 2016, reads in part:

“... NOW THEREFORE, BE IT HEREBY ORDAINED, that the following salaries are hereby established for employees of the Town of Paoli, Indiana, and effective January 1, 2016:

Town Council – \$600 (monthly)...

Clerk-Treasurer - \$926.40 (weekly)...”

Ordinance Number 2016-04, Amended Salary Ordinance for 2016, reads in part:

“WHEREAS, it has been determined that it is necessary for the Town Council of the Town of Paoli, Indiana to amend its Salary Ordinance for the year 2016, pertaining to Town employees, effective 12:01 A.M., August 3, 2016: ...

Clerk-Treasurer - \$962.40 (weekly)

Clerk-Treasurer Utility Office Mgr. - \$373.60 (weekly) ...

Prior Ordinances

All ordinances and/or parts of ordinances in conflict herewith are hereby repealed.”

The Board Minutes from the Town Council meeting held November 17, 2015, states in part:

“The Council considered a bonus for employees. Upon motion by Councilman Chastain, as seconded by Councilman Barnett, upon roll call vote of 5-0, it was determined to pay a net of \$500.00 after taxes to each full time employee with at least one year of service to the Town, as a Christmas bonus.”

III. LAW

Certain statutes apply. The first is IC 36-5-3-2, which is quoted in part in the State Board of Accounts preliminary Examination Results and Comments, but is stated in full as follows:

“Sec. 2. (a) As used in this section, “compensation” means the total of all money paid to an elected town officer for performing duties as a town officer, regardless of the source of funds from which the money is paid.

(b) The town legislative body shall, by ordinance, fix the compensation of its own members, the town-clerk treasurer, and the town marshal. The legislative body shall provide reasonable compensation for other town officers and employees.

(c) The compensation of an elected town officer may not be changed in the year for which it is fixed, nor may it be reduced below the amount fixed for the previous year.

(d) The legislative body may provide that town officers and employees receive additional compensation for services that:

- (1) are performed for the town;
- (2) are not governmental in nature; and
- (3) are connected with the operation of a municipally owned utility or function.

Subject to approval of the legislative body, the administrative agency operating the utility or function shall fix the amount of the additional compensation, which shall be paid from the revenues of the utility or function.”

The examination by the State Board of Accounts is subject to and in accordance with IC 5-11-5-1(a) and (b), which reads as follows:

“Sec. 1. (a) Whenever an examination is made under this article, a report of the examination shall be made. The report must include a list of findings and shall be signed and verified by the examiner making the examination. A finding that is critical of an examined entity must be based upon one (1) of the following:

- (1) Failure of the entity to observe a uniform compliance guideline established under IC 5-11-1-24(a),
- (2) Failure of the entity to comply with a specific law.

A report that includes a finding that is critical of an examined entity must designate the uniform compliance guideline or the specific law upon which the finding is based. The reports shall immediately be filed with the state examiner, and after inspection of the report, the state examiner shall immediately file one (1) copy with the officer or person examined, one (1) copy with the auditing department of the municipality examined and reported upon (if the subject of the report is a municipality), and one (1) copy in an electronic format under IC 5-14-6 with the legislative services agency, as staff to the audit committee and the general assembly. Upon filing, the report becomes a part of the public records of the office of the state examiner, of the office or the person examined, of the auditing department of the municipality examined and reported upon, and of the legislative services agency, as staff to the audit committee and the general assembly. A report is open to public inspection at all reasonable times after it is filed. If an examination discloses **malfeasance, misfeasance, or nonfeasance** in office or of any officer or employee, a copy of the report, signed and verified, shall be placed by the state examiner with the attorney general and the inspector general. The attorney general shall diligently institute and prosecute civil proceedings against the delinquent officer, or upon the officer’s official bond, or both, and against any other proper person that will secure to the state or to the proper municipality the recovery of any funds **misappropriated, diverted, or unaccounted for**.

(b) Before an examination report is signed, verified, and filed as required by subsection (a), the officer or the chief executive officer of the state office, municipality, or entity examined must have an opportunity to review the report and to file with the state examiner a written response to that report. If a written response is filed, it becomes a part of the examination report that is signed, verified, and filed as required by subsection (a). As part of the review of the examination report, the state examiner shall hold a gathering of the officer or chief executive officer of the state office, municipality, or entity examined, any employees or agents of the state office, municipality, or entity examined who are requested to attend by the officer or chief executive officer of the state office, municipality, or entity examined, and the members of the legislative and fiscal bodies of the municipality or entity examined. Such a gathering is referred to as an “exit conference” for the purposes of this subsection. The following apply to an exit conference.”

Black’s Law Dictionary, 6th Edition, in defining nonfeasance makes the following statement:

“There is a distinction between “nonfeasance” and “misfeasance” or “malfeasance”; and this distinction is often of great importance in determining an agent’s liability to third persons. “Nonfeasance” means the total omission or failure of an agent to enter upon the performance of some distinct duty or undertaking which he has agreed with his principal to do; “misfeasance” means the improper doing of an act which the agent might lawfully do, or, in other words, it is the performing of his duty to his principal in such a manner as to infringe upon the rights and privileges of third persons; and “malfeasance” is a doing of an act which he ought not do at all.”

Courts do interpret statutes under prescribed rules. The rules and interpretation of statutes has recently been explained by the Indiana Supreme Court in *State v. American Family Voices, Inc.* (Dec. 23, 2008) 898 NE2d 293, 297, as follows:

“When faced with a question of statutory interpretation, we first examine whether the language of the statute is clear and unambiguous. *City of Carmel v. Steele*, 865 N.E.2d 612, 618 (Ind.2007). If it is, we need not apply any rules of construction other than to require that words and phrases be given their plain, ordinary, and usual meanings. *Id.* This Court has articulated that, “[t]he primary purpose in statutory interpretation is to ascertain and give effect to the legislature’s intent.” *State v. Oddi-Smith*, 878 N.E.2d 1245, 1248 (Ind.2008). The statute itself is the best evidence of legislative intent, “and we strive to give the words in the statute their plain and ordinary meaning.” *Id.* We construe statutes only where there is ambiguity which requires construction. *Grody v. State*, 275 Ind. 651, 278 N.E.2d 280, 285 (1972). The plain meaning of the statute, if it has one, must be given effect. *Id.*

The plain language of the Autodialer Law is clear and unambiguous by its terms.”

The issue of interpretation of a statute which is ambiguous has been addressed in *Fishburn v. Indiana Retirement System*, 2N.E.3d 814, 824 (Ind.App.2014), as follows:

“In interpreting a statute, our goal is to determine and give effect to the intent of the legislature. *State v. Int’l Bus. Macs. Corp.*, 964 N.E.2d 206, 209 (Ind. 2012). We review an issue of statutory interpretation *de novo*. *Chrysler Grp., LLC v. Review Bd. Of Ind. Dept. of Workforce Dev.*, 960 N.E.2d 118, 124 (Ind. 2012). If the statutory language is clear and unambiguous, we require only that the words and phrases it contains are given their plain, ordinary, and usual meanings to determine and implement the legislature’s intent. *Id.* (citing *State v. Am. Family Voices, Inc.*, 898 N.E.2d 293 (Ind. 2008), reh’g denied). A statute is ambiguous, and open to judicial interpretation, where it is reasonably susceptible to more than one interpretation. *Pub. Employees’ Ret. Fund v. Shepherd*, 733 N.E.2d 987, 989 (Ind.Ct.App. 2000), trans. Denied. If a statute is ambiguous, we seek to ascertain and give effect to the intent of the legislature. *Id.* In doing so, we read the act as a whole and endeavor to give effect to all of the provisions. *Id.* At 988-990. We further presume that the legislature intended its language to be applied in a logical manner consistent with the underlying policy and goals of the statute. *Id.* At 990.

In addition, “[a]n interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself.” *LTV Steel, Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000). In particular, we defer to the agency’s reasonable interpretation of such a statute even over an equally reasonable interpretation by another party. *Chrysler Group*, 960 N.E.2d at 124.”

In *State v. Newbern*, 398 N.E.2d 683, 685-686 (Ind.App. 1 Dist. 1979), with respect to individual personal liability, the Court of Appeals held as follows:

“The State would have this court read IC 18-1-6-11 to impose strict liability upon a controller. We decline to hold that a controller is individually strictly liable regardless of the absence of fraud or malice or willful misconduct or even negligence on his part for any and all expenditures which are after-the-fact determined to be inappropriate.

In its motion for summary judgment the State argued that Newbern must be held liable because it was not within the powers of the City of Anderson to make such expenditures. The State has not suggested that Newbern acted negligently or that he acted maliciously, willfully, fraudulently, or in any other manner which would evince a lack of good faith on his part. Were therefore hold that the trial court correctly granted summary judgment in favor of Controller Newbern.”

IC 5-11-1-25(b) provides as follow:

“(b) Subject to section 9 of this chapter and subsections (c) and (d), the state board of accounts shall conduct examinations of audited entities at the times determined by the state board of accounts, but not less than once every four (4) years, using risk based examination criteria that are established by the state board of accounts and approved by the audit committee. The risk based criteria must include the following risk factors:

- (1) An audited entity has a newly elected or appointed fiscal officer.
- (2) An audited entity
 - (A) has not timely filed; or
 - (B) has filed a materially incorrect or incomplete; annual report required by section 4 of this chapter.
- (3) Any other factor determined by the state examiner and approved by the audit committee.”

IV. LEGAL ANALYSIS

Malfeasance, Misfeasance and Nonfeasance

The Town of Paoli, rather than straight jacketing itself by passing a salary ordinance including a bonus, began in 2012 to see how the finances were going in the town, then declaring a bonus for all town employees including elected officials later in the calendar year. The State Board of Accounts says that under IC 36-5-3-2, this procedure is correct with respect to employees, but not elected officials. Rather than telling the town it had to change its practice, the State Board of Accounts now is suggesting that elected town officials must repay amounts paid to them by virtue of actions taken in open meetings in full compliance with all legal requirements. Later in the discussion, the issue of whether the statute applies will be addressed.

It is clear that even if the State Board of Accounts’ analysis of IC 36-5-3-2 is correct, no amounts are required to be repaid under Indiana statute by any elected official.

Addressing the change effective August 3, 2016, paying from the town utilities, Town Clerk-Treasurer Amy Morris additional sums for services rendered to the utilities as Utility Office Manager, the action was not taken by Amy Morris at all. The action was taken at an open meeting by the Town Council and then widely publicized. Amy Morris did nothing. She cannot in any way be assessed guilty of malfeasance, misfeasance or nonfeasance with respect to the amounts that were justly awarded to her by the Council from the electric utility, and over which she had no control.

With respect to the bonuses paid annually in each of the years of the audit from 2012 – 2015, no action of the Board constituted malfeasance, misfeasance or nonfeasance as is required to support a repayment. There is no strict liability for elected officials who act in good faith, according to *State v. Newbern*, 398 NE2d 683, at 685-686 (Ind. App. 1 Dist. 1979).

The State Board of Accounts, which did not even audit within the four years as required by IC 5-11-1-25(b), is not following Indiana law in any regard by asking for reimbursement by town

officials. No member of the Town Council, nor the Clerk-Treasurer is guilty of malfeasance, misfeasance or nonfeasance. The definitions are stated herein. The hard working, underpaid, public servants of the citizens of the Town of Paoli should not be penalized by a tortured reading of Indiana law. IC 5-11-1-25(a) requires that for a payback to occur funds must be misappropriated, diverted or unaccounted for. None is applicable to the facts herein.

If the State Board of Accounts is correct (further in this analysis one will see that it is not), the correct remedy is to tell the Town of Paoli not to do this again, rather than assessing nonexistent malfeasance, misfeasance or nonfeasance.

Note the definitions of malfeasance, misfeasance and nonfeasance as stated herein. The timing of otherwise legal and valid compensation does not raise to prescribed improper conduct. No funds were misappropriated, diverted, or unaccounted for.

IC 36-5-3-2

1. Statutory Interpretation

As can be seen in *State v. American Family Voices, Inc.*, 898 N.E.2d 293, 297 (Ind. 2008), “When faced with a question of statutory interpretation, we must first examine whether the language of the statute is clear and unambiguous.” “If it is, we need not apply any rules of construction other to require that words and phrases be given their plain, ordinary, and usual meanings.”

IC 36-5-3-2(c) which reads:

“(c) The compensation of an elected town officer may not be changed in the year for which it is fixed, nor may it be reduced below the amount fixed for the previous year.”

appears before “(d)” which states:

“(d) The legislative body may provide that town officers and employees receive additional compensation for services that:

- (1) are performed for the town;
- (2) are not governmental in nature; and
- (3) are connected with the operation of a municipally owned utility or function.

Subject to approval of the legislative body, the administrative agency operating the utility or function shall fix the amount of the additional compensation, which shall be paid from the revenues of the utility or function.”

The plain and ordinary meaning of the statute would indicate that the compensation referred to in (c) does not apply to town utilities under (d).

The State Board of Accounts wishes to transpose (c) with (d).

If IC 36-5-3-2 is ambiguous, as can be seen in *Fishburn v. Indiana Public Retirement System*, 2 N.E.3d 814 (Ind.App. 2014), “If a statute is ambiguous, we seek to ascertain and give effect to the intent of the legislature.”

The only reasonable interpretation of IC 36-5-3-2 would allow a utility to determine whether the year revenues were sufficient to allow a bonus to be paid. To determine a bonus at the beginning of a year defies logic, common sense and any reasonable practice.

It should also be emphasized that under (c), “The compensation of an elected town officer may not be changed in a year for which it is fixed, nor may it be reduced below the amount fixed for the previous year.” Once the \$500.00 bonus was paid the first year, then it could not thereafter be reduced any following year. This argument is made only to show the conclusion of the State Board of Accounts to not be in conformance with its own reading of IC 36-5-3-2. The State Board of Accounts would reduce the bonus each year after the first year.

In *State v. Newbern*, 398 N.E.2d 683, 685-686 (Ind.App. 1 Dist. 1979), with respect to individual personal liability, the Court of Appeals held as follows:

“The State would have this court read IC 18-1-6-11 to impose strict liability upon a controller. We decline to hold that a controller is individually strictly liable regardless of the absence of fraud or malice or willful misconduct or even negligence on his part for any and all expenditures which are after-the-fact determined to be inappropriate.

In its motion for summary judgment the State argued that Newbern must be held liable because it was not within the powers of the City of Anderson to make such expenditures. The State has not suggested that Newbern acted negligently or that he acted maliciously, willfully, fraudulently, or in any other manner which would evince a lack of good faith on his part. Were therefore hold that the trial court correctly granted summary judgment in favor of Controller Newbern.”

None of the Town Council members, or Clerk Treasurer is guilty of malfeasance, misfeasance or nonfeasance.

State v. Newbern indicates quite clearly that there is no “strict liability” for a public official. There must be fraud or malice or willful misconduct or even negligence.

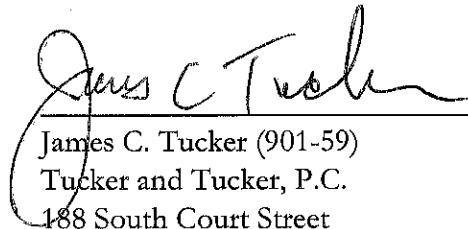
No town official has acted maliciously, willfully, fraudulently or in any other manner which would evince a lack of good faith on his or her part.

There can be no personal liability under the rule as established in *State v. Newbern*.

V. CONCLUSION

None of the Town Council members, former Town Council members or Clerk-Treasurer is obligated to repay any bonus or pay received by him or her during the period of the audit by the Indiana State Board of Accounts.

Respectfully submitted,

A handwritten signature in cursive script that reads "James C. Tucker". The signature is written in black ink and is positioned above a horizontal line.

James C. Tucker (901-59)
Tucker and Tucker, P.C.
188 South Court Street
Paoli, IN 47454
(812) 723-2313

TOWN COUNCIL
TOWN OF PAOLI
EXIT CONFERENCE

The contents of this report were discussed on January 24, 2017, with Carolyn N. Clements, President of the Town Council; Gary N. Barnett, Town Council member; Michael A. Harkness, Town Council member; William E. Chastain, Town Council member; and James C. Tucker, Town Attorney.

TOWN OF PAOLI
SUMMARY OF CHARGES
(Due to Malfeasance, Misfeasance, or Nonfeasance)

	Charges	Credits	Balance Due
Compensation and Benefit Overpayments to Elected Officials:			
Amy J. Morris, Clerk-Treasurer, pages 6 and 7	\$ 1,127.54	\$ -	\$ 1,127.54
Gary N. Barnett, Town Council member, pages 6 and 7	1,127.54	-	1,127.54
Michael A. Harkness, Town Council member, pages 6 and 7	1,127.54	-	1,127.54
Mark A. Jones, former Town Council member, pages 6 and 7	1,071.36	-	1,071.36
Louanne Lashbrook, former Town Council member, pages 6 and 7	557.41	-	557.41
Estate of Jerry Meadows, former Town Council member (deceased), pages 6 and 7	1,127.54	-	1,127.54
Totals	\$ 6,138.93	\$ -	\$ 6,138.93

This report was forwarded to the Office of the Indiana Attorney General.

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AFFIDAVIT

STATE OF INDIANA)
)
ORANGE COUNTY)

We, Phyllis Moffatt and Jonathan Wineinger, Field Examiners, being duly sworn on our oaths, state that the foregoing report based on the official records of the Town of Paoli, Orange County, Indiana, for the period from January 1, 2012 to December 31, 2013, is true and correct to the best of our knowledge and belief.

Phyllis Moffatt
Jonathan Wineinger
Field Examiners

Subscribed and sworn to before me this 15th day of March, 2017.

Beth Jones
Clerk of the Circuit Court